No. 80-944

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Supreme Court of the United States

October Term, 1980

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether—by reason of the Bennett Amendment to Title VII of the Civil Rights Act of 1964, the doctrine of *in pari materia* construction, or other principles of statutory interpretation—claims of sex discrimination in wage rates which are asserted under Title VII should be required to satisfy the "equal work" requirement of the Equal Pay Act.

Westinghouse Electric Corporation ("Westinghouse"), Petitioner herein, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1] In addition, the IUE, which had prevailed in this case in the Third Circuit, took the unusual step, on November 14, 1980, of filing a Petition For A Writ Of Certiorari (the "IUE's Petition") to seek review of the Third Circuit's Opinion. Accordingly, Westinghouse has included in this Petition a statement regarding certain points of disagreement with the IUE's characterization of the nature of this case as well as other contentions in the IUE's Petition, although both Westinghouse and the IUE agree that the legal issue involved in this case is an important one and that this Court should grant certiorari to review the Third Circuit's Opinion. Of course, Westinghouse

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1. The parties to the proceeding in the United States Court of Appeals for the Third Circuit, whose judgment is sought to be reviewed herein, were as follows: Westinghouse Electric Corporation as Defendant-Appellee and International Union of Electrical, Radio and Machine Workers, (hereinafter "IUE"), IUE Local 449, Marge Dinnan Brophy, Henrietta Brown, Melvina Cooper, Ann Raho Frazier and Helen Walsh, on behalf of themselves and on behalf of all persons similarly situated as Plaintiffs-Appellants.

believes that its Petition For Writ Of Certiorari is the one that should be granted and the normal sequence should be followed whereby Westinghouse, as the party which lost below, should be the one to file the opening and closing briefs and argument on the merits and comply with the other procedural requirements for the processing of this case.[2]

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2. Westinghouse has also filed a Response To The IUE's Petition For A Writ Of Certiorari wherein Westinghouse sets forth in slightly greater detail the reasons it believes that the Westinghouse Petition should be granted and the IUE Petition should be denied.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF REASONS FOR GRANTING THE PRESENT PETITION	10
REASONS FOR GRANTING THE PRESENT PETITION	12
I. This Issue Is An Important One That Is Presently Pending Before The Court. A Writ Of Certiorari Should Be Granted In The Present Case Also, To Provide For A More Extensive Presentation Of The Subject	12
II. The Third Circuit's Decision Is in Conflict With Prior Decisions Of This Court, As Well As With Decisions Of Five Of The Six Other Circuits That Have Considered This Issue	23
CONCLUSION	30
Appendix A—Opinion of the U. S. Court of Appeals for the Third Circuit, Filed August 1, 1980	1a
Appendix B—Order of the U. S. Court of Appeals for the Third Circuit Denying Rehearing and Rehearing *En Banc,* Filed October 29, 1980	53a
Appendix C—Opinion of the U. S. District Court for the District of New Jersey Granting Westinghouse's Motion for Summary Judgment, Filed February 8, 1979	55a
Appendix D—Opinion of the U. S. District Court for the District of New Jersey Granting Certification Under Fed. R. Civ. P. 54(b), Filed April 30, 1979	81a
Appendix E—Statutes and Regulations Involved	90a
Appendix F—June 6, 1967 Opinion Memorandum from EEOC Acting General Counsel Kenneth F. Holbert	94a

TABLE OF AUTHORITIES

CASES PAGE

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 25, 26

Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971) 23

Calage v. University of Tennessee, 400 F.Supp. 32 (E.D. Tenn. 1975), *aff'd,* 544 F.2d 297 (6th Cir. 1976) 23

DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978) 23

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 26, 29

Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1317 (9th Cir. 1980), *cert. granted,* No. 80-429 (Nov. 3, 1980) 12, 13, 18, 23

Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977) 23

Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3250 (U.S. October 6, 1980) 23

Novotny v. Great American Federal Savings & Loan Ass'n., 584 F.2d 1235 (3d Cir. 1978), *reversed,* 442 U.S. 366 (1979) 26

Novotny v. Great American Federal Savings & Loan Ass'n., 442 U.S. 366 (1979) 26

Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975) 23

Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976) 24

Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267 (4th Cir. 1980) 23

Train v. Colorado Pub. Int. Research Group, Inc., 426 U.S. 1 (1976) 24

Udall v. Tallman, 380 U.S. 1 (1955) 27, 29

United States v. United Continental Tuna Corp., 425 U.S. 164 (1976) 25

PAGE

STATUTES AND REGULATIONS

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e (1976) ..... passim

Fair Labor Standards Act of 1938, as amended by Equal Pay Act of 1963, 29 U.S.C. §206(d) (1976) ..... passim

29 C.F.R. §1604.8 (1979) 1, 27

29 C.F.R. §1604.7 (1965), originally published in 30 Fed. Reg. 14,927 (Dec. 2, 1965) 1, 27

LEGISLATIVE HISTORY

Hearings on H.R. 8898 and H.R. 10226 before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 87th Cong., 2d Sess. (1962) 14, 15

109 Cong. Rec. 9196 (Remarks of Rep. Frelinghuysen) 16, 17

109 Cong. Rec. 9197 (Remarks of Rep. Goodell) 16, 17

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet officially reported, but is unofficially reported at 23 F.E.P. Cases 588. The order of the court of appeals which denied a rehearing (App. B, *infra*) is not yet reported either officially or unofficially. The opinions of the district court (App. C and D, *infra*) are unofficially reported at 19 F.E.P. Cases 450 and 19 F.E.P. Cases 1028.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1980. The court of appeals denied Westinghouse's Petition For Rehearing and suggestion for rehearing in banc on October 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 255, 42 U.S.C. §2000e-2(a)(1); Section 703(h) of Title VII, 78 Stat. 255, 42 U.S.C. §2000e-2(h) [the second sentence of Section 703(h) contains the Bennett Amendment to Title VII]; and Section 6(d) of the Fair Labor Standards Act of 1938, as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d). The regulations involved herein are the 1965 regulations of the United States Equal Employment Opportunity Commission ("EEOC") interpreting the Bennett Amendment, which were issued contemporaneously with the outset of Title VII, as part of the EEOC's "Guidelines on Discrimination Because of Sex" in 30 Fed. Reg. 14928 (1965) and were then codified as 29 C.F.R. §1604.7; and the EEOC's revised regulations interpreting Section 703(h), which were issued on April 5, 1972 as part of the EEOC's revised "Sex Discrimination Guidelines" in 37 Fed. Reg. 6836 (1972) and numbered as 29 C.F.R. §1604.8. These statutes and regulations are set forth in App. E, *infra*.

STATEMENT OF THE CASE

This suit was filed by the IUE and its Local 449, the collective bargaining representative of production and maintenance employees at Westinghouse's Trenton, New Jersey Plant. The Complaint was based upon a charge that had been filed by the IUE and its Local 449 with the EEOC. The IUE also named in the Complaint certain women who were officials and/or members of the IUE Local as individual representative plaintiffs.[3] The Complaint invoked the jurisdiction of Title VII and essentially alleged two claims. The first claim was that the wage rates for job titles in which many women (as well as some males) have worked—such as light assembly and inspection work—are lower than Plaintiffs contend those rates should be in comparison to the rates paid certain other jobs that in times before February 1965 had allegedly been worked by males (although since at least 1965 these later jobs have been worked by women as well). The second type of claim in the Complaint related to allegations of general discrimination in other terms and conditions of employment. Only the first claim, that relating to wage rates, has been involved in the appeal below or in the present petition.[4]

After a plant inspection by their job evaluation expert, Plaintiffs admitted that men and women were not being paid differently when performing equal work in the Trenton plant. In response to Westinghouse's interrogatories, Plaintiffs acknowledged that they did not

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3. The Unions and the individual women are herein referred to collectively as the "Plaintiffs."

4. All claims regarding the general allegations of discrimination promptly were amicably resolved, settled, and dismissed with prejudice shortly after the claims regarding wage rates were dismissed.

allege that any job performed by women employees required "equal skill, effort and responsibility and is performed under similar working conditions as that of a job performed by male employees."[5] Plaintiffs characterized the nature of their contentions as follows: "Plaintiffs do not contend for example that men and women work as machinists doing the same work with women being paid less for doing so. What [they] do contend is that men and women work at *comparable jobs* with women being paid less solely because of their sex." (emphasis added).[6]

Plaintiffs' Answers to Interrogatories listed 71 separate job titles worked largely by women that they claimed were underpaid in comparison to various jobs worked largely by men. In those same Answers Plaintiffs indicated that they intended to establish the alleged underpayment of such jobs at trial by "expert testimony" and "comparisons which Plaintiffs would make at trial between various jobs" worked largely by women and others worked largely by men.[7] Plaintiffs also intended to introduce evidence as to how Westinghouse evaluated jobs back in the 1930's in an effort to show that the jobs were viewed by Westinghouse as having

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5. Answers of [representative] Plaintiff Marge Brophy to Interrogatories by Defendant at 27, adopted by all of the other Plaintiffs (C.A. App. 70).

6. Individual Plaintiffs' Response to Defendant's Opposition to Class Certification at 14.

7. The text of those Answers is set forth in App. A, *infra,* at 37a-38a n. 5. Those Answers discussed comparisons that Plaintiffs would make between, for example, the machine operator job, on the one hand, and the Forklift Truck Operator, Warehouseman, Supply, Janitor and other material-handling service-type jobs on the other (C.A. App. 82-83).

comparable worth back then. Thus, the case which the Plaintiffs offered for trial would have involved the district court in the vagaries and complexities of various job evaluation systems, including one allegedly used forty years ago, as well as comparisons (both forty years ago and now) of the job content and the proper wage rate to be paid to the more than 100 different jobs in the Plant.[8]

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8. The alleged "evidence" of intentional discrimination upon which Plaintiffs rely is a portion of an alleged 1938 Westinghouse Industrial Relations Manual which discusses how women's jobs would be evaluated for placement on a woman's wage curve. As discussed, *infra,* at 19-21, Westinghouse does not agree with the facile conclusions drawn in the IUE's Petition For Certiorari regarding that manual. The Company in 1938 was obviously evaluating women's jobs in relation to other women's jobs and for placement on the women's wage scale. Accordingly, the 1938 Manual provided that the evaluator, to award points (which would place a job on one of the wage curves), would look up the "anchor point" job in the manual which was similar to the "specific elements" of the job being evaluated (C.A. App. 114). Thus, the "anchor point" job against which a woman's job was evaluated was a job with similar duties, which obviously was also performed by women. The "anchor point" jobs in the material handling and craft area (which were male occupations in the 1930's) were grouped separately in the 1938 manual (C.A. App. 124). When a material handling job (which was worked by men) was being evaluated through use of the 1938 manual, it was evaluated by reference to other material handling jobs—not the light assembly or inspection work performed by women. Since the manual, itself, makes clear that male and female jobs were not being evaluated for payment on the same wage curve, the Company cannot be assumed to have been making a judgment as to the comparative economic worth (to the Company or in the labor market) of the job of a warehouseman versus that of an inspector. Thus, the fact that a man's job and a

Regarding the period subsequent to enactment of Title VII—even Plaintiffs do not contest that by 1965 the Trenton Plant had opened all jobs for bidding by men and women and had created a single wage scale.[9] However, Plaintiffs now contend that, although there were reductions in the comparative ranking of some

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woman's job may or may not have had the same number of evaluation points under the 1938 manual was not a judgment by the Company as to whether they should have been paid the same rate, since the manual was premised upon a system of separate wage scales for the sexes. Moreover, the manual, not being designed for use with a single wage scale system, cannot be assumed to have given the proper relative weight to the factors which differentiated the characteristics of male and female jobs, such as the proper weight to be given to physical effort and less desirable working conditions. In fact, as discussed *infra* at 20, it is more reasonable to assume that, if the male and female jobs had been intended to be evaluated with an eye toward payment on a single wage curve, the relative weight given to the various "factors" such as physical effort, working conditions, etc., may well have been different and the women's jobs would have received lower point totals. Of course, this Court would not be involved in resolving whether Westinghouse or Plaintiffs are correct as to the approach taken by Westinghouse forty years ago—since that is not relevant to the legal issue presented for review. The point that is relevant here, however, is that if Plaintiffs obtain their license to conduct a trial even though they have not met the equal work requirements, on the basis of their theory that there was intentional discrimination forty years ago, that type of trial will not be the simple inquiry that Plaintiffs now portray, but will involve the courts below in a complicated analysis of the vagaries of job evaluation and job comparisons at this plant over the last forty years.

9. Answers Of Plaintiff Marge Brophy To Interrogatories By Defendant, adopted by all Plaintiffs including the Unions (C.A. App. 67).

formerly male jobs and increases in the ranking of some formerly female jobs,[10] the ranking of jobs in the wage structure created by 1965 was not satisfactory. Plaintiffs raise this complaint because, as of 1975, the bulk of women (125 women) worked in jobs in *labor grade 3* while the bulk of the males (21 males) occupied *labor grade 5,* with the exception of the craft workers who occupied labor grades 8-13.[11]

There are several other matters of record herein which have been omitted from the IUE's Petition and which are relevant to an understanding of the context of this case and the trial sought by Plaintiffs. First, as should be self-evident, there have been (and continue to be) numerous changes in jobs, addition and deletion of job duties, eliminations of jobs and combinations of jobs that have occurred since the 1930's and 40's.[12]

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10. Answers Of Plaintiff Marge Brophy (C.A. App. 67, 69).

11. The IUE's Petition For Certiorari at 9 contains a chart showing labor grade population by sex as of November 30, 1975. The craft jobs occupy labor grades 8-13 as set forth in Response To Plaintiffs' First Set Of Interrogatories To Defendant Westinghouse Electric Corporation at 43-44. Actually, most of the craft workers are found in labor grades 12 and 13 at the top of the scale where the electricians and the "machine attendants," who repair all of the automated machinery in the plant, are located.

12. In the district court the Plaintiffs, through an affidavit submitted by Mark Klink, the Local Union President, admitted that changes in jobs are constantly taking place as follows:

> ". . . at least sixteen of the female jobs whose rates are challenged by plaintiffs were eliminated prior to March, 1978. . . . Jobs filled exclusively or primarily by males, to which the female jobs would have to be compared, have also been eliminated.

Second, there obviously has been collective bargaining with the Union at the Trenton Plant over the past 40 years. Revisions in the wage structure were not limited to 1965. In fact, as recently as 1968, the Company, Local 449, and the International Union reviewed the wage structure concerning all the jobs in the Trenton Plant. With the exception of seven specified jobs, *Local 449 and the IUE explicitly agreed on October 19, 1968 that by that date all jobs in the plant were classified in a proper relationship to each other and that no job's classification should be increased unless there were subsequent changes in the job.*[13] Westinghouse and the Union signed agreements in 1969 and 1970 to upgrade the seven jobs excepted from the 1968 agreement (C.A.

. . . Similarly, *defendant is constantly making changes in its machinery to reflect technological improvements or to reflect new product lines. These changes often alter the skill or effort necessary to operate the machine, or change the working conditions of the job.* Affidavit of Mary Klink, ¶6.

"Since *the ompany is constantly reevaluating and restructuring its operation,* it is reasonable to expect that job changes will be made while the unresolved issues in this case are litigated (emphasis added)." Memorandum In Support Of Plaintiff Unions' Motion For Certification Under Rule 54(b) at 4.

13. The Company and the Union signed an Agreement to that effect on October 19, 1968. That Agreement is attached as Addendum A to the Affidavit of H. A. Sieber (C.A. App. at 103-107). It was signed on behalf of the International Union by Ellis Hockenberry, Asst. to the Chairman of the IUE's Westinghouse Conference Board and by officers of Local 449. Three of the five Local officers who signed the Agreement were women. (C.A. App. 106). Three fourths of the Local Union membership is female. (See chart at C.A. App. 165).

App. 104, 108-9). Thus, Westinghouse and the IUE and Local 449 reviewed all the jobs in the Trenton Plant and agreed in writing in 1968-1970 that all jobs were classified in proper relationship to each other.

As previously noted, Plaintiffs have not disputed that, since February 1965, all jobs in the Trenton Plant have been open for bid by both sexes on the basis of seniority.[14] Thus, women admittedly have been able to select whatever jobs they desired over the entire period since enactment of Title VII under the seniority system in operation at the plant, which had been negotiated with the plaintiff Union. However, most women have continued to voluntarily select the light assembly and inspection type work rather than the heavier and dirtier jobs or the skilled craft jobs (which are the jobs still largely populated by males). Nevertheless, in order to assure that women (and minorities) were working in jobs which they desired, a special program (the Upward Mobility Affirmative Action Program) was created by Westinghouse in 1975 to contact every single woman and minority employee of the Plant and offer them special training, transfer rights and rate protection if they wanted to move to any job in which a significant number of women were not already working. The record shows that only four women requested jobs upon which women were not already working in a significant number.[15]

Thus, this case presents the situation of women who have wanted to occupy light assembly and inspec-

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14. Answers of Plaintiff Marge Brophy to Interrogatories by Defendant, adopted by all Plaintiffs (C.A. App. 67).

15. Affidavit of H. A. Sieber, filed on June 17, 1977, in the district court (C.A. App. 101).

tion jobs but nevertheless claim they should receive the higher wage rates of jobs they have elected not to take.

Westinghouse did not believe that, under the legal standards applicable to sex-based wage rate claims, it was required to undergo the massive job evaluation trial that would have resulted from Plaintiffs' contentions in the wage rate area. Accordingly, since Plaintiffs had admitted in discovery that their wage claims did not assert that men and women were paid differently when performing equal work, Westinghouse sought and obtained summary judgment on Plaintiffs' claims regarding the pay rates for the jobs in the plant. The district court held that Plaintiffs' allegations did not state a claim upon which relief could be granted under Title VII. The district court, after considering the legislative history, administrative interpretations, and prior decisions, held that Congress desired "to limit the scope of judicial intervention into the business place" when it adopted the "equal work" standard in the Equal Pay Act and that Congress also intended the "equal work" standard to be incorporated into Title VII as reflected in the second sentence of Section 703(h) thereof—the Bennett Amendment. The district court rejected Plaintiff's theory that the Bennett Amendment only intended to incorporate the four affirmative defenses contained in the Equal Pay Act, but not the core "equal work" standard of that earlier Act. In response to a motion by Plaintiffs, the district court entered final judgment on the wage claims in the Complaint pursuant to Fed. R. Civ. P. Rule 54(b) (App. D, *infra*). The Plaintiffs then appealed to the Third Circuit. In a split decision, a panel of the Third Circuit found that the "equal work standard" would not apply to claims by blacks or Jews or Italians

[an issue which was not before them], and that notwithstanding the Bennett Amendment, Congress must not have intended any different treatment of women (App. A, *infra*). On October 29, 1980, the Third Circuit issued an order denying Westinghouse's Petition For Rehearing, which had requested a rehearing by the original panel as well as a rehearing in banc.

SUMMARY OF REASONS FOR GRANTING THE PRESENT PETITION

The legal issue presented by this case is obviously an important one for employers, entire industries, the economy, the court system and the public. As discussed herein, this Court has previously recognized the importance of this issue by granting a writ of certiorari to review the Ninth Circuit's decision which raises the same legal issue as the present petition, *i.e., County of Washington v. Gunther,* No. 80-429, *cert. granted,* November 3, 1980. In addition to the importance of this issue, the conflict of the decision below with the decisions of five other circuit courts (the 10th, 4th, 5th, 8th, and 6th) also provides a strong basis for granting the writ of certiorari. Moreover, the Third Circuit's decision conflicts with prior decisions of this Court, as set forth *infra* at 23-29, in the following respects: (1) by reason of the principle of *in pari materia* statutory construction, when Congress has carefully deliberated upon a subject (such as in the Equal Pay Act) the restrictions and limitations set forth in that earlier statute (such as the equal work requirement) should not be disregarded in the interpretation and application of a subsequent statute absent a specific statement of Congressional intent to that effect in the subsequent statute,

(2) by reason of the Bennett Amendment, the equal pay for equal work provisions of the Equal Pay Act were intended to be applicable to claims of sex discrimination in compensation brought under Title VII, and (3) the original official administrative interpretation of a statute (here the EEOC's original official view of the Bennett Amendment, which supports Westinghouse) is the agency interpretation most entitled to deference.

There are good reasons that the Court should set the present case for briefing and argument on the merits, in addition to the *Gunther* case. First, this case is a good example of how disregard of the equal work standard will lead to prolonged excursions into aeons of industrial history and will lead to massive job evaluation trials and complex job comparisons by the federal courts in order to determine what the present wage rates and wage relationships between jobs should be. The present case involves an old industrial plant and a large industrial union. The scope of Plaintiffs' claims and the magnitude of the relief sought herein also provide a good example of the probable impact of the doctrine of broad federal court involvement in the area of alleged sex discrimination in wage rates, which currently is being advocated by these Plaintiffs as well as various governmental agencies. Moreover, as discussed *infra* at 14-17, there is direct legislative history regarding these claims by this same Union regarding this very plant which were presented to Congress. The Congressional response was a flat rejection of the concept of federal court involvement in these types of claims. Finally, the present case has been extensively briefed below and the opinions of the district court and the dissent in the court of appeals provide a thorough debate of both sides of the issues herein. For example, the dis-

sent below contains a well-reasoned discussion of various issues, such as the principles of *in pari materia* statutory construction, which are absent from the Ninth Circuit's *Gunther* opinion. Thus, the grant of Westinghouse's Petition would complement the grant of certiorari in the *Gunther* case. For the reasons more fully set forth in Westinghouse's Response To The IUE's Petition For A Writ Of Certiorari, which also has been filed this date, the present Petition filed by Westinghouse, as the party aggrieved by the decision below, should be the one granted, rather than the Petition filed by the IUE.

REASONS FOR GRANTING THE PRESENT PETITION

I. This Issue Is An Important One That Is Presently Pending Before The Court. A Writ Of Certiorari Should Be Granted In The Present Case Also, To Provide For A More Extensive Presentation Of The Subject.

On November 3, 1980, this Court granted a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in the case of *County of Washington v. Gunther* (Case No. 80-429).[16] The legal issue presented by the *Gunther* litigation is the same legal issue presented herein—whether sex-based discrimination claims under Title VII must satisfy the equal work standard of the Equal Pay Act.[17] Plaintiffs

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16. *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), *rehearing denied*, 623 F.2d 1317, *cert. granted*, No. 80-429 (Nov. 3, 1980).

17. *County of Washington v. Gunther*, No. 80-429, Petition for Writ of Certiorari at i.

herein relied heavily upon the Ninth Circuit's *Gunther* decision in their briefs to the Third Circuit, and the majority opinion in this case acknowledged several times that it was persuaded by the *Gunther* opinion (App. A, *infra,* at 25a and 31a-32a).

The issue in this case is an important one for employers, employees, and the courts. Congress, after eighteen months of deliberations, made a judgment in 1963 that it desired only limited involvement by the federal courts in the setting of wage rates, as reflected in its rejection of broader approaches and the adoption of the more narrow equal work standard.[18] There is no suggestion anywhere in the legislative history of Title VII that the same Congress which had just enacted the Equal Pay Act completely reversed its attitude just one year later and countenanced broad involvement by the federal courts in the wage area. Yet that is exactly what the opinion of the Third Circuit in the present case permits. Since the Third Circuit Opinion eliminates both the Bennett Amendment and the principle of *in pari materia* statutory construction as restrictions upon claims of sex discrimination in wage rates—the equal work standard will no longer provide a limitation upon the types of wage rate claims which plaintiffs may assert. Virtually every type of claim regarding sex discrimination in wage rates that can be imagined must now be adjudicated by the trial courts. We believe that this will be an extensive burden upon the courts, as well as employers, and one that was not intended by Congress. Moreover, the elimination of the equal work standard has potentially broad implications for the economy as a whole.

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18. See discussion *infra* at 14-17.

Reasons for Granting the Present Petition.

We believe that the grant of certiorari in the present case would complement the grant of certiorari in *Gunther* for a number of reasons. For example, the present case is a particularly appropriate one to resolve this important issue since the lead plaintiff in this case, the IUE, presented to Congress the very same contentions asserted in this suit regarding this very plant of Westinghouse in the course of the hearings on the Equal Pay Act, and Congress amended the language of the Equal Pay Act to preclude federal involvement in such types of claims.

The legislative history of the Equal Pay Act of 1963 indicates a clear concern and a deliberate decision by Congress as to how the Government should deal with a prior history of separate wage structures for men and women—a practice which was not then uncommon in American industry.[19] Some legislators and the unions favored a system of broad intervention by the federal courts so as to allow claims of sex discrimination in wage rates to be stated in situations where men and women were paid differently for performing jobs which were "comparable." Accordingly, the original bills provided for the broad "comparable work" approach. H.R. 8898, 87th Cong., 1st Sess.; H.R. 10226, 87th Cong., 2d Sess.

Among those who testified in support of H.R. 8898 and H.R. 10226 was James Carey, President of the IUE.

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19. *See Hearings on H.R. 8898 and H.R. 10226 before the Select Subcomm. on Labor of the House Comm. on Education and Labor,* 87th Cong., 2d Sess., Part 1 (1962), at 65 (discussing a then recent survey of the National Office Management Association wherein one-third of the employers surveyed admitted to having dual pay standards for males and females) [hereinafter "1962 Hearings"].

Mr. Carey stated that he supported the "comparable work" bill because it precluded:

> "Paying women lower wages irrespective of the value of the work performed. This occurs in situations where men and women work in different types of jobs in the same plant." 1962 Hearings at 173.

In support of the "comparable work" bill, Mr. Carey put before Congress in 1962 the very allegations regarding the Trenton Plant later set forth in the Complaint in the present case.[20]

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20. In an effort to have Congress adopt such wage discrimination legislation not limited to equal work situations, Mr. Carey stated: "In Westinghouse for many years there existed two pay scales—one for women and one for men. In most cases the top of the women's scale was equal to the lowest part of the men's scale." 1962 Hearings at 175. After explaining that the alleged two separate pay scales had been eliminated. Mr. Carey continued: "However, in combining the two wage scales, Westinghouse put all the female jobs at the bottom of the ladder. Therefore, although in most plants [Westinghouse] do[es] not have two wage scales, one for the women and one for men, the effect is virtually the same." 1962 Hearings at 175. Mr. Carey cited an example from this very plant of what he hoped would be wage discrimination under the proposed comparable work standard: "In our *Westinghouse plant at Trenton, N.J.*, the female quality-control worker, who requires 12 months' experience gets $2.10 an hour. The male janitor who requires no experience gets $2.11½ an hour." 1962 Hearings at 175-176 (emphasis added). Mr. Carey then presented a Westinghouse employee, who testified that jobs performed by women in lamp plants (such as feeding the glass envelope into the machines or taking the finished bulb out of the machine or performing inspection)—were "comparable" to totally different jobs performed by men (such as material handling or mechanical maintenance) when the training, skill and value of the work

However, Congress explicitly rejected the "comparable work" approach in order to preclude broad federal intervention in the setting of wage rates. Congress determined that its response to a history of dual wage structures for men's and women's jobs would not be a requirement that the entire wage structure of a plant or an industry be revised, but only that equal pay be assured when equal work was performed. The debate on H.R. 6060 is very instructive with respect to Congress' intent to prevent the courts and the government from changing wage rates in all but the narrow equal work situation. For example, Representative Frelinghuysen stated in the House:

> "[W]e can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek is to insure, *where men and women are doing the same job under the same working conditions, that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses.*" (emphasis added) 109 Cong. Rec. 9196.

Representative Goodell (the sponsor of H.R. 6060) stated:

> "Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical; that is, they would be very much

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was considered. 1962 Hearings at 183-189. Mr. Carey urged passage of the "comparable work" bill to remedy the above alleged sex discrimination and involve the government, *inter alia,* in the wage structure of the Trenton Plant.

> alike or closely related to each other." 109 Cong. Rec. 9197.

Representative Frelinghuysen also noted:

> "As indicated earlier, it is not intended to compare unrelated jobs, or jobs that have been historically and normally considered to be different." 109 Cong. Rec. 9196.

As discussed, *infra,* at 25-29, when the sex discrimination provisions of Title VII (which were a late addition to the bill) were discussed by that same Congress, it was clearly contemplated that the above deliberations and conclusions, reflected in the Equal Pay Act's equal work standard, would not be reversed by the sex discrimination provisions of Title VII. In fact, the Bennett Amendment was introduced to assure that there would be no such reversal. However, the point for consideration here is that the present case, with its directly relevant legislative history regarding the Trenton Plant in the Equal Pay Act hearings, is a particularly appropriate example of how the approach of the Third Circuit is directly contrary to the Congressional intention that the federal courts have only a limited involvement in a company's wage structure.

There are several other reasons that the present case is a good one for resolution of this legal issue. This case involves a large industrial plant with more than one hundred separate job titles, seventy-one of which Plaintiffs claim are underpaid in relation to the others. This case provides a good example of the scope of the burden that will be placed on private employers and the courts from broad scale litigation of wage structures, as well as the magnitude of the economic impact upon a plant, an employer, or an entire industry which could result

from a broad scale elevation of wage rates—which is precisely the relief sought by Plaintiffs herein and precisely the type of intervention rejected by Congress in the Equal Pay Act.

This is not an isolated case. There are similar cases pending regarding other Westinghouse plants in other circuits. Moreover, countless other employers in the United States might be alleged to have had "male" and "female" jobs back in the era before enactment of Title VII. If the courts must examine the wage structure of each of those employers in the 1930's and 1940's as well as what has happened to that structure to date, the cost and burden of that examination on the court system, as well as employers, will be overwhelming.[21]

The present case also is a good one for resolution of this legal issue because the Plaintiffs' admission that they could not meet the equal work standard and the district court's subsequent entry of summary judgment on that basis makes the dispute herein a pure question of law. Moreover, the district court's thorough opinion and the presence of a well-reasoned dissent to the majority opinion in the court of appeals also has provided a thorough debate on the issues. For example, that dissent contains a perceptive analysis of the proper application of the principles of *in pari materia* construction of the Equal Pay Act and Title VII—a subject which is not even mentioned in the Ninth Circuit's opinion in *Gunther, supra.*

Although Westinghouse believes that a writ of certiorari should be granted to review the present case as well as the *Gunther* case for the above reasons and al-

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21. The IUE, alone, has filed EEOC charges covering literally scores of Westinghouse facilities.

though Westinghouse concurs with the IUE that the present case is an important one, we wish to make clear that Westinghouse does not subscribe to various of the other contentions advanced in the IUE's Petition For A Writ Of Certiorari. For example, in said Petition at 11 the IUE claims that this Court should take review of the present case because the IUE contends that the Plaintiffs herein did not intend to "rely upon any comparisons of job content to prove their claim of discrimination," while the *Gunther* case would involve such comparisons. That contention is not correct, as is established by the numerous answers to interrogatories and other pleadings filed by the Plaintiffs in this case—some of which are cited and quoted *supra* at 3-7. Of course, Plaintiffs also intended to rely upon the alleged prior existence of a dual wage structure and certain portions of a 1938 industrial relations manual which the IUE has discussed in its Petition.

The existence of the 1938 manual would neither remove the necessity for job comparisons nor enable a trial court to escape the vagaries and complexities of job evaluation if the limitations of the equal work standard were not recognized and this case were set for trial. Let us consider just a few examples of factual issues that would envelop the court regarding job evaluation. As discussed *supra* at 4, whether a male and a female job may have received the same number of evaluation points under that 1938 manual was obviously not intended as a judgment as to their relative economic worth either to the Company or the labor market, since the male jobs were being evaluated thereunder for placement on a male wage curve and the female jobs for placement on a female wage curve. Because there were to be two separate wage curves, there was no need for

the 1938 manual to fully weight the factors, such as working conditions and physical effort, which in those days (by reason of, *inter alia,* state protective laws reflecting social convention, etc.) differentiated the male and the female jobs. In 1938, the Company needed only a system which ranked the men's jobs in relation to each other for the male curve consistently with the way they would be ranked in the labor market for jobs with those types of duties, and which ranked the women's jobs in relation to each other for the female curve consistently with the way that they would be ranked in the labor market for jobs with those types of duties. The Company did not need a system which ranked the men's jobs versus the women's jobs.[22] Moreover, the relevant inquiry at a trial (assuming that a trial were authorized in other than equal work situations) would not be what the jobs were worth back in 1938. The relevant question

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22. Even the portion of the 1938 manual quoted in the IUE's Petition at 7 noted that said manual did not adequately consider the differences in environmental conditions on women's jobs or the fact that others would have to be brought in whenever heavy work was involved, since these features would be picked up by the creation of a separate wage curve for women. Since a separate wage curve for women was intended, the factors such as physical effort and working conditions—which differentiated women's jobs from men's jobs—may not have been fully reflected in the relative weighting of (i.e., the number of evaluation points allocated to) the factors contained in the 1938 job evaluation manual. One cannot assume that, had a single wage curve, including both the male and the female jobs, been planned, that the same relative point ratings for physical effort and working conditions or the other factors would have been used. Actually, that would have been highly unlikely since it would have put Westinghouse totally out of line with the general labor market. Under the 1938 manual, the wage rate for the various jobs on

is what are they worth now, in the 1970's and 1980's.[23] Thus, in ascertaining the current propriety of the relationship of the jobs in the Trenton Plant or any other plant today, as well as in formulating any award of back pay or directing revisions in pay levels should a violation be found, a trial court would inevitably be required to engage in job comparisons.

The purpose of this discussion is not to convince the Court whether the IUE or Westinghouse is correct as to what happened in the design of the 1938 manual—even assuming that were possible to ascertain at this point. The actual resolution of these factual issues is not relevant to the issue before this Court—which is a pure legal issue as to whether the equal work standard was intended by Congress as a prerequisite to sex-based compensation claims under Title VII. However, the fact that these many factual issues relating to job evaluation would exist if the limitations of the equal work standard were not observed and this case were sent to trial provides a realistic context for the resolution of the pure legal issue presented by this Petition. Such a trial would

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the curves were set (and the wage curves were thus constructed) according to the respective labor market rates for the different types of jobs (C.A. App. 160). As the 1956 key sheet reflected in the IUE's Petition at 8 indicates, the light assembly and inspection jobs performed by the women were worth less in the labor market than the material handling and craft jobs and were paid less.

23. As discussed *supra* at 6-7, there have obviously been numerous changes in job duties and job content, combinations of jobs, splitting of jobs, creation of totally new jobs, etc., over the past forty years, as well as numerous upgradings and downgradings of jobs in the plant and also agreements with the Union regarding the relative relationships of jobs.

clearly immerse the federal court system in the vagaries and complexities of the evaluation of jobs with different content, a function which we submit was clearly rejected by Congress in full contemplation of the nature of the claims asserted by the IUE regarding this very plant of Westinghouse.[24]

Thus, we believe that the Court has already recognized, through the grant of certiorari in *Gunther,* that this issue regarding the interpretation of the Bennett Amendment and the interrelationship of the Equal Pay Act and Title VII is an important one for employers and employees, as well as one that is likely to have a great impact on the workload of the federal court system. We submit that the present case would provide a good companion to the *Gunther* case as a vehicle for resolution of this issue. While the present case and *Gunther* both raise the same legal issue, the present case has some additional characteristics, *e.g.,* the directly relevant legislative history of the Equal Pay Act, an industrial setting, and the issue being presented as a pure question of law, which complement the characteristics of the *Gunther* case. Furthermore, the *Gunther* case involves a public employer. The present case demonstrates the impact of this issue in the private sector as well. For all of these reasons, the grant of certiorari in this case, as well as *Gunther,* may provide a broader frame of reference and may assist the Court's examination of the legal issue raised by both cases.

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24. See discussion *supra* at 14-17.

II. The Third Circuit's Decision Is In Conflict With Prior Decisions Of This Court, As Well As With Decisions Of Five Of The Six Other Circuits That Have Considered This Issue.

The decision below held, in accord with the Ninth Circuit in *Gunther, supra,* that the language of the Bennett Amendment meant to incorporate into Title VII only the Equal Pay Act's affirmative defenses, and not the basic equal work standard. The Third Circuit, like the Ninth Circuit, acknowledged that the language of the Bennett Amendment might plausibly be read to have incorporated the basic equal work standard as well as the affirmative defenses. However, the court of appeals rejected the incorporation of the equal work standard because that court stated that it would not acknowledge any special treatment of the problem of sex discrimination absent "explicit statutory language or Supreme Court holdings." (App. A, *infra,* at 16a). The Third Circuit's decision is not only in conflict with the logical meaning of the language of the Bennett Amendment but also with decisions of the Tenth, Fourth, Fifth, Eighth and Sixth Circuits which have taken the position that the basic equal work standard was made applicable to Title VII wage claims by the Bennett Amendment and the principle of *in pari materia* statutory construction.[25]

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25. *Lemons v. City and County of Denver,* 620 F.2d 228, 229-30 (10th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3250 (Oct. 6, 1980); *Ammons v. Zia Co.,* 448 F.2d 117, 120 (10th Cir. 1971); *Stastny v. Southern Bell Telephone & Telegraph Co.,* 628 F.2d 267, 281 (4th Cir. 1980); *Keyes v. Lenoir Rhyne College,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977) (affirming —— F.Supp. ——, 23 W.H. Cases 319, 328-29 (W.D.N.C. 1976)); *Orr v. MacNeill & Son, Inc.,* 511 F.2d 166, 170-71 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975); *DiSalvo v. Chamber of Commerce,* 568 F.2d 593, 596 (8th Cir. 1978); *Calage v.*

In addition, there are three major points upon which the Third Circuit's decision conflicts with prior decisions of this Court. First, the Third Circuit has explicitly refused to apply the principle of *in pari materia* statutory construction. The court of appeals acknowledged that under that principle the equal work standard carefully adopted by Congress in the Equal Pay Act of 1963 would be applicable to Title VII unless there were a clear indication otherwise in the legislative history of Title VII (App. A, *infra,* at 18a). The Third Circuit admitted that application of that principle, as reflected in this Court's decision in *Radzanower v. Touche, Ross & Co.,* 426 U.S. 148, 153 (1976), suggested that Title VII should be interpreted as adopting the equal work standard. The Third Circuit failed to note two other decisions of this Court which had been discussed in the briefs and argument. In *Train v. Colorado Pub. Int. Research Group, Inc.,* 426 U.S. 1 (1976), this Court, in reconciling the Atomic Energy Act with the later federal Water Pollution Control Act, emphasized that meticulous work of an earlier Congress should not be considered to have been discarded absent a clear indication in a later enactment that Congress intended to do so. This Court pointed out that the Atomic Energy Act was a major piece of legislation which had been carefully considered in Committee and by Congress to establish a thorough and pervasive regulatory scheme. Similarly, the Equal Pay Act represents a major piece of legislation in the wage area and it would be highly improper to discard Congress' eighteen months of meticulous work absent some clear indication that Congress intended to do so in Title VII. Neither the Plaintiffs nor the Third Circuit has ever pointed to any statement in the legislative his-

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University of Tennessee, 400 F.Supp. 32 (E.D. Tenn. 1975), *aff'd,* 544 F.2d 297 (6th Cir. 1976).

tory which states or even suggests that Congress intended to reverse its prior adoption of the equal work standard. The most that Plaintiffs and the Third Circuit have said is that the statements which appear to support Westinghouse are somewhat ambiguous. Even if those statements were ambiguous (which we submit they are not)—ambiguity would not be a basis for rejection of the prior Congressional adoption of the equal work approach.

The Third Circuit's opinion also conflicts with the opinion of this Court in *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), which involved a situation similar to the present. This Court noted that the issue in that case was not whether a particular statute would no longer have application to a particular set of facts, but whether the restrictive provisions thereof could be evaded by asserting jurisdiction under another statute, a similar situation to what we have here. This Court noted that such an evasion of the restrictive provisions would be tantamount to repeal of the more restrictive statute and would not be permitted by the Court absent some clear statement of intent by Congress that such was intended by the latter statute.[26]

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26. The Third Circuit mistakenly refused to comply with these decisions because it incorrectly believed that this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) made those principles of *in pari materia* statutory construction inapplicable to employment discrimination cases. But, *Alexander* merely held that an employee's election to proceed in one forum (arbitration) did not bar him from proceeding under Title VII. This certainly did not suggest that the principles of *in pari materia* construction were not applicable to interpretation of Congress' intent regarding the meaning of the substantive provisions of discrimination statutes. The Third Circuit had mistakenly relied upon *Alexander* as the basis for the same incorrect premise

A second point of conflict arises from the Third Circuit's incorrect reading of this Court's decision in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976). Regarding *General Electric,* the Third Circuit stated: "With the Bennett Amendment the Equal Pay Act *exceptions* became 'applicable to Title VII as well.' *General Electric v. Gilbert,* 429 U.S. at 144 (Equal Pay Act provisions on pregnancy benefits are controlling)." However, what this Court actually said in *General Electric* was: "Because of this [Bennett] amendment, interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well . . ." 429 U.S. at 144. This Court, as part of its *General Electric* holding that no violation of Title VII existed, quoted and relied upon a regulation of the Wage and Hour Administrator which interpreted the core ("equal pay for equal work") provision of the Equal Pay Act—not one of that Act's affirmative defenses. 429 U.S. at 144. The Court took this approach after emphasizing that the Congressional intent reflected in the Equal Pay Act was very relevant, especially in light of the brevity of legislative history regarding Title VII's sex provisions. 429 U.S. at 143. It is curious that the Third Circuit's Opinion contains no discussion of the Equal Pay Act legislative history

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in *Novotny v. Great American Federal Savings & Loan Ass'n.,* 584 F.2d 1235 (3d Cir. 1978). This Court in reversing the Third Circuit made clear that it is Congressional intent that is the critical inquiry. *Novotny v. Great American Federal Savings & Loan Ass'n.,* 442 U.S. 366, 378 (1979). This Court's *Novotny* decision rejects any attempt to utilize *Alexander* to expand a statute's substantive meaning.[29] Thus, the Third Circuit has not justified its acknowledged refusal to apply the principle of *in pari materia* statutory construction, and its refusal to apply that principle conflicts with prior decisions of this Court.

wherein Congress rejected the IUE's request that the broad "comparable work" standard be adopted so that it could attack the wage structure of Westinghouse's Trenton Plant and, instead, Congress adopted the "equal work" standard because of a Congressional desire for only limited federal involvement in wage rates.[27]

The decision below also conflicts with the decisions of this Court holding that contemporaneous interpretations of a statute by administrative agencies are the ones most entitled to deference. *General Electric, supra,* 429 U.S. at 142; *Udall v. Tallman,* 380 U.S. 1, 16 (1965). The regulations issued by the EEOC, interpreting the Bennett Amendment, in 1965, stated that: ". . . the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." (App. E, *infra,* at 92a). The 1965 interpretation contained no suggestion that the Bennett Amendment was intended to incorporate only the Equal Pay Act's affirmative defenses. When the EEOC issued revised regulations on sex discrimination in 1972, it eliminated the statement in the prior regulations which indicated that Section 703(h) incorporated the equal work standard.[28] After the decision in this case, Westinghouse obtained from the EEOC, for the first time, a 1967 opinion by the EEOC's Acting General Counsel which interprets the words of the Bennett Amendment as does

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27. See pp. 14-17, *supra.*

28. The new regulations, instead, somewhat ambiguously stated: "By virtue of Section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII." (App. E, *infra,* at 93a).

Westinghouse and is directly contrary to the interpretation urged by the EEOC, appearing as amicus curiae, before the Third Circuit and adopted by the Third Circuit. The 1967 opinion acknowledges that the equal work standard (*i.e.*, equal skill, effort, responsibility, and working conditions), not merely the Equal Pay Act's affirmative defenses (*i.e.*, seniority systems, merit system, etc.), was incorporated by the phrase "authorized" in the Bennett Amendment.[29] If a writ of certiorari is granted, Westinghouse will discuss other early opinion letters issued by the EEOC General Counsel to the general public which similarly indicate that the equal work standard was intended by the Bennett Amendment to be a prerequisite to assertion of a sex-based wage discrimination claim under Title VII.[30] In the late 1960's

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29. That opinion (App. F, *infra*, at 94a-97a) also makes clear that the statement in Section 1604.8(a) [referred to as Section 1604.7 at the time of the 1967 opinion] that the "employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Section 703 and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act" was, as Westinghouse had urged to the court of appeals, a reference to the jurisdictional and procedural matters of "employee coverage" and did not refer to whether the elements of the equal work standard were intended to be incorporated by the word "authorized." Thus, the Third Circuit majority opinion which relied on a narrow definition of the phrase "authorized" (App. A, *infra*, at 16a) and the reference in the regulations to "employee coverage" (App. A, *infra*, at 29a-31a) is contradicted on both counts by the 1967 opinion.

30. E.g., the May 19, 1966, opinion letter of EEOC General Counsel Charles T. Duncan. These opinions, which confirmed the interpretation that Westinghouse had urged regarding the Bennett Amendment and the

and early 1970's the EEOC began to change its interpretation and in 1972 changed its regulations, as discussed above, to delete the incorporation of the equal work standard and to refer instead only to a "defense" based on the Equal Pay Act. The Third Circuit erred in looking to these latter interpretations of the Bennett Amendment rather than the approach taken by the EEOC's 1965 regulations, issued contemporaneously with the statute. *General Electric, supra; Udall, supra.*

Thus, the decision below conflicts not only with opinions of other circuits, but also with those of this Court.

EEOC's 1965 regulations, were submitted to the Third Circuit as part of Westinghouse's petition for rehearing which was denied.

CONCLUSION

For all of the foregoing reasons, Westinghouse believes that its Petition For Writ Of Certiorari should be granted, and that this case should be set for argument. This case could be scheduled for argument at the same time as the *Gunther* case. The briefing schedule herein could be adjusted, if deemed appropriate by the Court, to provide for argument at the same time as the *Gunther* case. For the reasons set forth at 2-4 of Westinghouse's Response To The IUE's Petition For A Writ Of Certiorari, filed simultaneously herewith, Westinghouse believes that the Petition For A Writ Of Certiorari filed by the IUE, which was not aggrieved by the decision below, should be denied.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1893 and 79-1894

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 449, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 627, an unincorporated association, H. J. ADAMS, GENEVIEVE ARNETT, JOSEPHINE BAKER, MARGE DINNAN BROPHY, HENRIETTA BROWN, DOROTHY M. BURTON, MINNIE CHATMAN, MARY E. COBB, A. CONTENTO, MELVINA COOPER, JEAN CORBIN, NORMA DOYLE, ELEANOR DYE, TANYA FOURSHEE, D. FOWLER, DOROTHY GAINES, MARTHA GANT, MADELINE GIESE, L. M. HARRIS, DOROTHY HAYES, ELEANOR HUNKER, PAULINE LEE, J. LINDENTHAL, OLLIE LITTLE, MADELINE MARTINO, D. P. MASSI, RENA McLEOD, S. McNEIL, PATTI MITCHELL, ROBERTA MOORE, MABEL MORRELL, MILDRED OCIKI, HELEN O'LOUGHLIN, MARY PFISTER, ANN RAHO, R. RAINEAR, P. RUTOWSKI, LORETTA RYAN, J. L. SHELDON, V. VAUGHN, HELEN WALSH, and SHIRLEY WATKINS, on behalf of themselves and on behalf of all persons similarly situated,

v.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation

Appendix A.

International Union of Electrical, Radio and Machine Workers, AFL-CIO,CLC ("IUE") and Local 449 and 627,

Appellants in 79-1893

Marge Brophy, Henrietta Brown, Melvina Cooper, Ann Raho Frazier and Helen Walsh, on behalf of themselves and the class they represent,

Appellants in 79-1894

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 75-1870)

Argued: March 20, 1980

Before: SEITZ, *Chief Judge*
VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed August 1, 1980)

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Appendix A.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

The plaintiffs in this case brought suit alleging, *inter alia,* that the Westinghouse Electric Corporation (Westinghouse or the company) had set the wage rates lower for those job classifications which were predominantly filled by females than the wage rates for those job classifications which were predominantly filled by males. Plaintiffs claimed that this disparity was attributable to the fact that the company deliberately paid lower wages for those types of work which would be done predominantly by women. They claimed this disparity is in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2-2000h-6.[1] The district court held that Title VII did not prevent sex discrimination in setting wage rates for different

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1. This action was originally part of a larger action filed in the Western District of Pennsylvania which alleged similar discriminatory practices at numerous Westinghouse facilities. The counts involving the New Jersey plants were severed and transferred to the District of New Jersey. The allegations relating to the New Jersey plants asserted that Westinghouse had violated Title VII by:

> (a) paying [women] unequal pay in that male employees performing the same or substantially the same work receive higher pay; (b) paying [women] lower rates of pay than would be paid [them] if [their] skill, effort and responsibility were evaluated on the same basis as is used in evaluating work performed by males, and (c) failing to afford [women] the rights of promotion and transfer to better paying jobs on the same basis as males; and (d) otherwise affording [women] unequal compensation, terms, conditions and privileges of employment because of [their] sex.

Count Two, Complaint, ¶32, *reprinted in* App., at 25.

categories of jobs unless it could be shown that the jobs, regardless of the reason for their classification, involved equal or substantially equal work. Because the plaintiffs had stated that they did not intend to prove that the jobs predominantly filled by women were the same as the jobs predominantly held by men, the court granted Westinghouse's motion for partial summary judgment. The plaintiffs appealed.

The instant case pushes us to the edge of subtle concepts of statutory construction. It involves sophisticated aspects of personnel policies and job classifications and it rests on a legislative history which is not totally free of ambiguity. Thus, at the outset it is essential that we make clear what is not involved in this case. Westinghouse is not being charged with the type of discrimination where different wages have been paid to men and women who are in the same classification and

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It also alleged that Westinghouse:

(1) had denied members of the plaintiff class "[t]he opportunity to work and at the same time afforded all male employees a full eight hour shift and in some instances afforded male employees additional overtime work", Count Three, Complaint, ¶44;

(2) had denied members of the plaintiff class "the opportunity to work 8 hours per day as did all male employees", Count Four, Complaint ¶49, and

(3) had discriminated against one of the named plaintiffs "by requiring her to stop work thereby depriving her of holiday pay, as well as her regular weekly wages, credited service, and other benefits in that she was only in her sixth month of pregnancy and was able, willing and desirous of continuing to work and had the approval of her personal physician for such work." Count Five, Complaint ¶53.

App., at 25-32.

who perform the same work. For any classification which was predominantly filled by women, Westinghouse paid the same wage to any male who might work within that same classification. The problem here is that Westinghouse allegedly used a system which set the wage rates lower for any classification if the group covered within that category was predominantly female. Under the applicable law it is clear that Westinghouse could not create job classifications whereby different wages were paid to one group solely because of considerations of religion, race or national origin.[2] The statutory issue here is whether Congress intended to permit Westinghouse to willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irishmen, or any other group protected by the Act. Because we hold that this alleged intentional discrimination in formulating classifications of jobs violates Title VII, we will reverse.

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2. 42 U.S.C. §2000e-2 (emphasis added) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, *or classify* his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religon, sex, or national origin.

Appendix A.

I.

Westinghouse's present wage structure, according to the plaintiffs,[3] is derived from a wage structure Westinghouse established in the late 1930's which was described in Westinghouse's Industrial Relations Manual Wage Administration, Part 3, section 3 (1939), *reprinted in* Appendix at 110. At that time all of the job classifications at Westinghouse's Trenton, New Jersey plant were allegedly segregated by sex. The "female" jobs included assembly line jobs, sub-assembly jobs and quality control jobs. The "male" jobs included janitor, forklift operator, warehouseman, various material handling jobs, and craft jobs. For simplicity we will refer to those job classifications which are predominantly filled by women as "female" jobs and those filled predominantly by men as "male" jobs. The 1939 manual explains that the company first "point-rated" all of its jobs taking into account the knowledge and training required, and the specific demands and responsibilities of the job. It then assigned each job a numerical value, based on an evaluation of these three factors. Next each job was assigned a "grade" based on its point rating and "keysheets" were developed which set forth the hourly wage for jobs at each labor grade. The plaintiffs contend that the wage rates for female jobs were set lower than the rates for male jobs which had received the same point rating. Indeed, Westinghouse's manual stated, "The rate or range for Labor Grades [for women] do not coincide with the values on the men's scale. Basically then, we have an-

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3. On a motion for summary judgment all factual disputes are resolved against the moving party. We have therefore adopted the plaintiffs' version of the facts in our resolution of this appeal. *See* Adickes v. S. H. Kress and Co., 398 U.S. 144, 158-59 (1970).

other wage curve or Key Sheet for women *below* and not parallel with the men's curve." *Id.* at 158a (emphasis added).

In 1965 the company established a unitary key sheet in which the grades had no explicit sexual designation. The plaintiffs contend that the new wage scale, which is still in use, embodies the deliberately discriminatory policy of the prior plan. In support of their view, they contend that Westinghouse expanded the number of labor grades from nine to thirteen and generally accorded female jobs labor grades in the new scale below those of male jobs even though these jobs had been at corresponding labor grades before the merger. They also point to the fact that the vast majority of the women at the Trenton plant are still employed in the female jobs. Their records show employee assignments at the Trenton plant as of November 30, 1975 as follows:

Westinghouse—Trenton Plant

	Male	*Female*
LG1	0	6
LG2	0	33
LG3	1	125
LG4	0	18
LG5	21	16
LG6	4	14
LG7	3	0
LG8	2	0
LG9	3	1
LG10	4	0
LG11	0	0
LG12	19	0
LG13	19	0
	76	213

Brief for Appellants at 10-11. This table shows that with a single exception the 183 employees working at Labor Grades 1 through 4 were women, the grades into which the female jobs were placed in 1965. Thus, eighty five percent of the women working in the plant in 1975 were assigned to these jobs. Although the plaintiffs acknowledge that "there have been some changes in job content over the years, and some rate adjustments," in their view "the changes have not eradicated the wage inequities established by the [1930] system." *Id.* at 10.

The district court held that Title VII had not been violated even if the wage scale had been set in the manner described by the plaintiffs. It reasoned that because of the Bennett Amendment, which is included in section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), sex-based discrimination in compensation violates Title VII only if it also violates the Equal Pay Act of 1963, 29 U.S.C. §206(d) (Equal Pay Act). The court held that the Equal Pay Act proscribes discriminatory compensation only when it is shown that the plaintiff performs the *same* work or substantially the same work of other employees. Since the plaintiffs in this case agreed that their suit did not involve classifications involving the same work or substantially the same work, the district court ruled that the plaintiffs did not have a cause of action under Title VII. *International Union of Electrical Workers v. Westinghouse Electric Corp.*, 19 FEP Cases 450 (D.N.J. 1979) [hereinafter *IUE I*]. The late Judge Barlow, one of our most distinguished trial judges, summarized his holding by stating, "In conclusion, therefore, we have ruled that allegations and proof of unequal pay for unequal, but comparable, work does not state a claim upon which relief can be granted. . . ." *Id.* at 457.

In response to a motion by the plaintiffs, the district court entered final judgment on this claim and certified an order so that it could be appealed pursuant to Rule 54(b), Fed. R. Civ. Proc.[4] *International Union of Electrical Workers v. Westinghouse Electric Corp.*, 19 FEP Cases 1028 (D.N.J. 1979) [hereinafter *IUE II*].

II.

Because it affects our jurisdiction we asked the parties to brief the question of whether the district court properly certified the judgment pursuant to Rule 54(b). We conclude that the district court did not abuse its discretion when it entered the final order. *See Curtiss-Wright Corp. v. General Electric Corp.*, 48 U.S.L.W. 4422 (S.Ct. Apr. 22, 1980). The district court noted that as a result of the earlier decision, *IUE I*, the claim of sex-based wage discrimination was terminated and the is-

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4. Fed. R. Civ. Proc. Rule 54(b) provides:
(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

sue would not be raised a second time after a trial on the remaining claims. Noting that the claim was one of statutory construction and did "not deal with the factual issues at the heart of the unadjudicated claims," the court felt the issue was "sufficiently distinct to permit certification." *IUE II,* 19 FEP Cases at 1029-30. The court also took into consideration the fact that the EEOC had argued that the claim involved a " 'novel issue' which is likely to recur." *Id.* at 1029. We agree that these factors weigh in favor of certification and will therefore affirm the entry of the final order.

III.

A.

At the heart of this appeal lies an amendment to Title VII which was introduced by Senator Bennett of Utah in the final days of the passage of the Civil Rights Act of 1964. The Bennett Amendment (the Amendment), which was adopted as introduced by Senator Bennett and included in section 703(h) of Title VII, provides:

> It shall not be an unlawful employment practice under this subchapter for an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. §2000e-2(h). Section 206(d) of Title 29, the Equal Pay Act of 1963, proscribes sex-based discrimination in compensation for the same or substantially the same work except when the differential is the result of

"(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[5] The dispute here is about what is meant by the phrase in the Amendment "if such differentiation is authorized by".

This phrase could mean that except for the four limitations of section 206(d), Title VII has as broad a coverage on sex discrimination changes as it does in any other case. Thus, other than the four exceptions of the Equal Pay Act, there is no dilution of sex discrimination coverage in Title VII cases. This argument could be called the "broad coverage position," and is asserted by the plaintiffs and the EEOC. On the other hand, the language in the Amendment could be construed to deny sex discrimination cases the "broader coverage" and to

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5. 29 U.S.C. §206(d) provides in pertinent part:

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any esablishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

limit the prohibition against sex-based discrimination in wages to situations where the employees are performing the same or substantially the same work, in the manner that the Equal Pay Act is limited. This later view is urged by Westinghouse.

We have not found the resolution of this dispute to be a simple one. Our research has not revealed any single document or statement which unambiguously gives the Amendment meaning. Yet, each document we have found pushes us slowly yet firmly to the conclusion that the Bennett Amendment merely incorporates into Title VII the four exceptions outlined in the Equal Pay Act, the "broader coverage position".

B.

At the outset we note that the construction urged by Westinghouse would result in a substantial limitation on the scope of Title VII's power to address the problems of sex-based discrimination in employment.[6] Westinghouse's position would permit employers to discriminate

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6. Section 703(a), 42 U.S.C. §2000e-2(a) provides:
(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex,* or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

against women even though they could not pursue similar discriminatory practices against others on account of race, religion or national origin. As an example, it is clear that Title VII prohibits an employer from paying more per hour to welders than plumbers *if* the reason for the employer paying higher wages to the welder is that the majority of the welders are Protestants and that the majority of the plumbers are Catholics. In such a case an employer would be "classify[ing] his employees . . . in [a] way which would deprive any individual of employment opportunities [high wages] . . . because of such individual's . . . religion." 42 U.S.C. §2000e-2(a). While Westinghouse presumably would not challenge the illegality of the scheme outlined above, it asserts that the scheme would be permissible if the reason for the wage disparity is that the majority of welders are men and the majority of plumbers women. The Supreme Court has never ruled on the statutory issue raised in this case, but in dicta in Title VII cases, the Court tends to refer to discrimination on the basis of race, religion, sex, or national origin as they are equally nefarious and equally prohibited. For in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) (emphasis added) (citations omitted), the Supreme Court stated:

> We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, *sex,* or national origin, . . . and ordained that its policy of outlawing such discrimination should have the "highest priority". . . .

In the absence of explicit statutory language or Supreme Court holdings to the contrary, we are hesitant to conclude that Title VII would allow discriminatory behavior on the basis of sex, when the same behavior would be prohibited if made on the basis of race, religion or national origin.[7]

C.

We start our inquiry, as all inquiries involving statutory construction should, with the language of the statute. *Lewis v. United States,* 48 U.S.L.W. 4205, 4207 (S.Ct. Feb. 27, 1980). The Bennett Amendment states that differentiations "authorized by" the Equal Pay Act are not unlawful. Normally the term "authorized" is used to describe something that is endorsed or expressly permitted and not, as Westinghouse suggests, something which is merely not prohibited.[8] Thus, the plain lan-

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7. We reject the argument made by amicus Equal Employment Advisory Council that our task is easier because it is clear that Congress wished to discourage courts from becoming involved in "massive job evaluation trial[s]" and Congress therefore limited the scope of Title VII's prohibition against sex discrimination. Since Congress was willing to permit "massive job evaluation trial[s]" if racial, religious or ethnic discrimination was charged, we cannot presume that they would be fearful of such trials involving sex discrimination.

8. Webster's Third New International Dictionary 146-47 (1961) defines "authorize" in the following manner:

> *1a:* to endorse, empower, justify, or permit by or as if by some recognized or proper authority . . .: SANCTION . . . *b* . . . to furnish grounds for: JUSTIFY. *2* . . . to vouch for . . . *3* . . . to give legality or effective force to . . . *4a:* to endow with authority or effective power, warrant, or right: appoint, empower, or warrant regularly, legally, or officially . . . *b.* to grant or allot by proper authority . . .

guage of the Amendment lead us to the conclusion that the Amendment dilutes Title VII only to the extent that it incorporates the four wage differentials expressly endorsed or permitted by the Equal Pay Act.

Westinghouse asserts that other language in section 703(h), of which the Bennett Amendment is a part, suggests a contrary interpretation, for this language already provides for three of the four exceptions to the Equal Pay Act.[9] Westinghouse argues that most of the Bennett Amendment would be superfluous if it were limited to the four exceptions, and thus it contends the language of the Act supports its position. We do not agree. We find it more reasonable to conclude that the repetition of the exceptions in the Amendment ensured that the two statutes would be interpreted in the same manner. With the Bennett Amendment the Equal Pay Act exceptions became "applicable to Title VII as well." *General Electric v. Gilbert,* 429 U.S. at 144. (Equal Pay Act provisions on pregnancy benefits are controlling).

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9. *Compare* Title VII, 42 U.S.C. §2000e-2(h):

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, . . .

with the Equal Pay Act, 29 U.S.C. §206(d):

> except where such payment is made pursuant to (i) a seniority system, (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

By making the acts coterminous Congress eliminated the possibility that an employer would be subject to conflicting regulations. Thus, the language is not surplusage.

Westinghouse argues that we should apply the *in pari materia* canon of statutory construction. Under this canon, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976), *quoting, Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). We decline to apply this canon, for it is inconsistent with the Supreme Court's caution that remedies for employment discrimination "supplement" each other and should not be construed so as to ignore the differences among them. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 & n. 9 (1974). Further it conflicts with another rule of statutory construction, namely, "where a statute with respect to one subject contains a specific provision, the omission of such provision from a similar statute is significant to show a different intention existed." *Richerson v. Jones*, 551 F.2d 918, 928 (3d Cir. 1977), *quoting, General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 & n. 4 (5th Cir. 1967); *Tooahnippah v. Hickel*, 397 U.S. 598, 606-07 (1970). Thus, we conclude that the plain language of the statute suggests that only the four exceptions of the Equal Pay Act were incorporated as limitations on Title VII.

Appendix A.

D.

The legislative materials on the Bennett Amendment are remarkable only for their equivocacy and turbidity. As has oft been noted, sex was added as a protected classification late in the debate on the Civil Rights Act as the result of an amendment proposed by Representative Smith of Virginia. Probably because sex discrimination was not contemplated as part of the original bill, the "legislative history of Title VII's prohibition of sex discrimination is notable for its brevity." *General Electric v. Gilbert,* 429 U.S. at 143. The Bennett Amendment was not part of the Civil Rights Act when it had first passed the House and was sent to the Senate, although the Act at that time included the prohibition against sex discrimination. The Amendment was included later on the floor of the House, after cloture was adopted, following a very brief colloquy. Only a few legislative materials are available. Some are ambiguous and, as the parties before us have demonstrated, an ingenious and intelligent mind may find support in all of them for either interpretation. After our review, however, we conclude that on balance they show that Congress intended the more limited scope urged by the plaintiffs.

The first discussion of the issue of discrimination in compensation based on sex is presented by Senator Clark, one of the bill's floor managers. In April 1964 he introduced into the Congressional Record a memorandum which included his answers to questions raised by Senator Dirkson about the Civil Rights Act.[10] There he

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10. The passage reads in its entirety:
Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act

stated: "The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." 11 Cong. Rec. 7217 (1964).

This passage is ambiguous as it can be interpreted to mean that Title VII is only as broad as the Equal Pay Act. It is, however, equally possible that Senator Clark simply meant that when equal work challenges were made, the Equal Pay Act was controlling and that he was not addressing the problem of discrimination of the sort alleged here. The memorandum is not helpful as a guide to interpret the Bennett Amendment, however, for the comment was made on April 4th, and the Bennett Amendment was not introduced until two months later, June 12, 1964. The passage is therefore only helpful to the extent that it suggests that there was some interest in Congress in the interrelationship of the two acts.

The second passage records the colloquy which occurred when Senator Bennett introduced his amend-

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of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.

Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerour exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.

110 Con. Rec. 7217 (1964).

ment to the Senate and it was subsequently approved.[11] Introducing the bill, Senator Bennett explained, "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." Senator Dirkson stated in response, "The Fair Labor Standards Act [Equal Pay Act] carries out certain exceptions. All that the pending amendment

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11. The passage reads in its entirety:

Mr. BENNETT. Mr. President, I yield myself 2 minutes.

I call up my amendment No. 1051 and ask that it be read.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Mr. BENNETT: Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places. I do not believe sufficient attention may have been paid to possible conflict between the wholesale insertion

does is recognize those exceptions, that are carried in the basic act." *Id.* at 13647. The import of these comments is that the Amendment was merely intended to carry forward the exceptions of the Equal Pay Act. In our analysis we give this passage special significance, as this is the only explanation provided to the body which voted on the Amendment.

The third item is Representative Celler's July 2nd explanation to the House of the changes the Senate made in the House bill, including the Bennett Amendment. There he stated, "Second. [The Senate amendment] [p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(b)." *Id.* at 15896. The district court suggested that this showed that Title VII was meant to be no broader

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of the ward "sex" in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY: The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amended is fully acceptable.

Mr. DIRKSEN: Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

than the Equal Pay Act. *IUE I,* 19 FEP Cases at 454. An equally plausible construction is that compliance with the "equal work" requirements of the Equal Pay Act met Title VII's requirement on that issue only. We are persuaded that Representative Celler must have intended the later interpretation since Title VII proscribes a broad range of gender-based discrimination which is not barred by the Equal Pay Act, such as discriminatory promotions, transfers and firing.

Finally, there are two items written after the Civil Rights Act was passed. We view them cautiously as we are mindful of the Supreme Court's warning in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 354, n. 39 (1977), that "[t]he views of the members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight." The first is a memorandum introduced into the Congressional Record by Senator Bennett, in June 1965. The final words of the memorandum state explicitly, "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also

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All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER: (Mr. Ribicoff in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to.

110 Cong. Rec. 13647 (1964).

violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965).[12]

The plaintiffs have pointed us to a sentence earlier in the memorandum which states that the Amendment merely refers to the exemption of certain employees

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12. His explanation in full is:

Relation of Title VII to the Equal Pay Act: An Explanation of the Bennett Amendment

Section 703(h) of the Civil Rights Act of 1964 states: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

The amendment speaks in terms of a "differentiation * * * authorized by the provisions of section 6(d) of the Fair Labor Standards Act."

Section 6(d) authorizes two things:

1. Wage differentials on equal jobs made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The amendment therefore means that it is not an unlawful employment practice; (a) to differentiate on the basis of sex in determining the compensation of white collar and other employees who are exempt under the provisions of the Fair Labor Standards Act; or (b) to have different standards of compensation for nonexempt employees where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act.

111 Cong. Rec. 13359 (1965).

from Equal Pay Act coverage and to the four exceptions of the Equal Pay Act. They argue that this shows Senator Bennett felt the Amendment referred only to the exceptions.[13] We cannot agree. The final statement is quite explicit and it does support Westinghouse's view. Nevertheless, we are not persuaded that this passage represents the intent of Congress at the time it passed the Amendment. We note that it differs from Senator Bennett's earlier explanation, which was the explanation relied on by the Congressmen who approved the Amendment. Further, there was very little discussion of this *ex post facto* history at the time it was introduced and it was not voted upon. We agree with the Ninth Circuit's interpretation of the significance of this passage. In *Gunther v. County of Washington,* 22 FEP 1650, 1652 (9th Cir. 1980), *aff'ing upon petition for rehearing,* 602 F.2d 882 (1979), that court stated:

> As the amendment's sponsor, Senator Bennett's understanding of the amendment might have been entitled to some weight if it had been expressed contemporaneously with the passage of the legislation. See Galvan v. Press, 347 U.S. 522, 526-27 (1954). Coming one year after the Bennett Amendment was enacted, however, the statement at best reflects what was on Senator Bennett's mind when he introduced the amendment and is entitled to no weight. See Manhart v. Los Angeles Department of Power and Water, 553 F.2d 581, 589 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978) (discussion occurring "hours" after passage of Bennett Amendment is not part of amendment's legislative history). Either from a legal

13. *See* note 12, *supra,* for text of memo.

standpoint or as a practical matter, Senator Bennett's statement cannot express what was on Congress' collective mind when it acted a year earlier. If Senator Bennett's "clarifying" statement has any significance, it must be as evidence that the amendment was ambiguous on its face and that its contemporaneous legislative history was not enlightening.

The second item written after the Act was passed is contained in a 1977 Senate Report on amendments to Title VII.[14] The Senate Committee states, "It is the committee's opinion that [an] application of the Bennett amendment which assumes that the provision insulates from Title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act is not correct". S. Rep. No. 95-311, 95th Cong., 1st Sess. at 7 (1977). We note the report was written in response to a Supreme Court decision interpreting section 703(h) in a manner which the Senate committee thought was contrary to the view of Congress. The earlier legislative his-

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14. The Report states in pertinent part:
The Supreme Court seemed to believe, despite apparently contradictory Equal Pay Act regulations, that the discrimination in question in *Gilbert* would be authorized by the Equal Pay Act. See 29 C.F.R. 800.151. It is the committee's opinion that this application of the Bennett amendment which assumes that that provision insulates from Title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act is not correct; by expressly precluding reliance on section 703(h) in this context, therefore, the committee merely intends to insure that employers may not rely on the Equal Pay Act to prevent the correction of pregnancy under Title VII.

S. Rep. No. 95-331, 95th Cong., 1st Sess. at 7 (1977).

tory is consistent with the committee's later statement and supports the plaintiffs' position. We, however, have the same difficulty with this passage that we have with Senator Bennett's memorandum. It is *ex post facto,* and it was neither voted upon nor approved by the Congress as a whole. Thus, we do not rely on it.

About the time of the passage of the Bennett Amendment, June 12, 1964, a number of other amendments which would have limited the scope of Title VII, and which would have had a much smaller potential impact on the scope of Title VII's coverage, were rejected by the Senate.[15] Between June 4 and June 17, when the Civil Rights Act was approved by the Senate, twenty-three amendments were rejected. Among them was an amendment to permanently restrict Title VII's coverage to establishments with 100 or more employees (No. 606), 110 Cong. Rec. 13093 (1964); Senator Tower's original testing amendment (No. 605), *id.* at 13505; an amendment requiring that Equal Employment Opportunity Commission (EEOC) employees identify themselves when serving as investigators (No. 963); *id.* at 13650; an amendment expressly permitting EEOC em-

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15. On June 9, the Senate debated and rejected Amendments 606 and 898. 110 Cong. Rec. 13085, 13093 (1964). On June 22, the Senate debated and rejected Amendments 569 and 605. *Id.* at 13492, 13505. On June 12, the Senate debated and rejected Amendments 607 and 962. *Id.* at 13648-52. On June 13, the Senate debated and rejected Amendment 963. *Id.* at 13650, 13696. On June 15, the Senate debated and rejected Amendments 519 and 547. *Id.* at 13825-26 and 13838. On June 16, the Senate debated and rejected Amendments 550, 846, 855, and 1020. *Id.* at 13910 and 13943-46. On June 17, the Senate debated and rejected Amendments 590, 847, 922, 1021, 1023 and 1024. *Id.* at 14179, 14182-83, 14186-87, 14191-93, and 14196-97.

ployees to give congressional testimony (No. 922), *id.* at 14193, 14196; an amendment prohibiting the EEOC from withholding any evidence, testimony or records from any court or congressional committee (No. 550), *id.* at 13910; and an amendment allowing the EEOC to elect its own chairman and vice chairman, rather than providing for their appointment by the President (No. 946), *id.* at 13945-56. We think that the congressional opposition to these minor amendments suggests that the Bennett Amendment was not intended to limit Title VII's coverage as Westinghouse urges for the Amendment probably would have been more widely disputed and discussed if that was the intent. Again, this evidence is not decisive to our decision, but it supports the plaintiffs' interpretation.

In summary we conclude that the legislative history shows that the Bennett Amendment merely incorporated the four exceptions of the Equal Pay Act into Title VII without otherwise limiting Title VII's coverage.

E.

The third group of materials we have used to unravel the meaning of the Bennett Amendment are the regulations and rulings of the EEOC, the regulatory body charged with enforcing the Civil Rights Act. The EEOC's regulations, issued in 1972, make it quite explicit that "the prohibitions against discrimination based on sex contained in Title VII is co-extensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered

by the Fair Labor Standards Act". 29 C.F.R. §1604.8 (1978).[16]

The district court discounted these regulations because it felt that the regulations were inconsistent with earlier EEOC regulations issued in 1965. It was the district court's view that the 1965 regulations stated that the discriminatory wage scales were impermissible only if the wage scales were also in violation of the Equal Pay Act. 19 FEP Cases 454-56. The court held that earlier regulations were controlling, relying on *General Electric v. Gilbert*.[17] In *Gilbert* the Supreme Court found that the EEOC's newer regulations covering pregnancy benefits "flatly contradict[ed] the position which the agency had enunciated at an earlier date, closer to the enact-

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16. 29 C.F.R. §1604.8 (1978) provides in full.

Relationship of Title VII to the Equal Pay Act.

(a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of Section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised, the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

17. The 1965 regulations provided:

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to

ment of the governing statute." 429 U.S. at 142. It held that the newer regulations were therefore not entitled to the deference normally afforded EEOC regulations. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). ("interpretation of the Act by the [EEOC] is entitled to great deference.")

The rule set forth in *General Electric v. Gilbert* is not applicable to these regulations. The 1965 regulations stated that "with respect to situations to which both statutes are applicable . . . the standards of the 'equal pay for equal work' set forth in the Equal Pay Act" are applicable to Title VII. 30 Fed. Reg. 14928 (1965). They do

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which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800 119-800.163. Relevant opinions of the Administrator interpreting " the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

30 Fed. Reg. 14928 (1965).

not state that Title VII's scope is no broader than the Equal Pay Act. Indeed, the regulation specifically provides that "discrimination in compensation because of sex is co-extensive with that of the other prohibition in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act." *Id.* Second, and most important, the EEOC, in a number of cases decided before the 1972 guidelines were issued, found Title VII applicable to situations where the wage rates for jobs held predominantly by women were set lower than the wage rates for jobs held predominantly by men. In these cases the wage rates were lower because the jobs were held predominantly by women and not because of the job requirements. *See, e.g.,* Decision No. 70-112, 1973 EEOC Decisions (CCH) ¶6108 (Sept. 5, 1969); Decision No. 70-695, 1973 EEOC Decisions (CCH) ¶6148 (April 13, 1970). The EEOC's position has been generally consistent and thus the traditional deference which courts give to agency regulations is to be given in this case. *See United States v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 719 (1975) (courts will give "considerable weight" to a "consistent and longstanding interpretation by the agency charged with administration of that statute). Thus, we find that the EEOC regulations also support the plaintiffs construction.

F.

The caselaw, for the most part, adds little to our inquiry. The Supreme Court's references to the Equal Pay Act in the context of Title VII are inconclusive and only one decision by a Court of Appeals has squarely faced the issue raised in this appeal. In that case, *Gunther v. County of Washington,* the Ninth Circuit held that Title

VII was violated when wages for females were intentionally set, on the basis of sex, lower than wages for men who held different jobs. We find the *Gunther* decision to be persuasive and note that that court's interpretation of the Bennett Amendment's legislative history is consistent with our own.[18] The Tenth Circuit in a different factual setting held in *Lemons v. Denver,* 22 FEP Cases 959 (10th Cir. 1980), that Title VII did not prevent sex discrimination in wages for comparable jobs. We note that *Lemons* is distinguishable because the lower court found that the city had not set the wages for women lower than the wages for men on account of their sex. " 'The City draws no distinction between male and female employees.' " 22 FEP Cases at 960 (quoting the district court's findings). The other cases in both the Courts of Appeals, including this circuit, and the district courts are not helpful because the issue raised by

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18. Although it is not important to our decision, the facts of *Gunther* demonstrate the difficulty with Westinghouse's interpretation. The plaintiffs were female matrons and prison guards who asserted that they were paid lower wages than the male prison guards on account of their sex. Earlier in Dothard v. Rawlinson, 433 U.S. 321 (1977), the Supreme Court had held that sex was a bona fide occupational qualification for the position of a prison guard and therefore women could lawfully, under certain circumstances, be excluded from the positions held by men. Had the Ninth Circuit found that Title VII permitted the alleged wage discrimination, the women may have been left without redress. They could neither sue for higher wages, nor could they try to transfer to the higher paying jobs to escape the alleged discrimination practices of the city.

this case was not decided and thus only address this issue in dicta.[19]

IV.

With the Civil Rights Act of 1964, Congress released a strong and forceful weapon against employment discrimination. To paraphrase the Supreme Court's words: "It would be ironic indeed if [the Equal Pay Act,] a law triggered by a Nation's concern over centuries of [sexual discrimination] and intended to improve the lot of those who had 'been excluded from the American dream for so long' " were to lead to the contraction of their rights under Title VII. *United Steelworkers of America v. Weber,* 443 U.S. 193, 204 (1979), *quoting* Senator Humphrey, 110 Cong. Rec. 6552 (1964). Nothing we have found suggests that this act was to be weakened so as to "authorize" the explicit discrimination in compensation the plaintiffs assert that Westing-

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19. In some of the cases the courts did not reach the issue, but in dicta viewed the Bennett Amendment as being limited to the four exceptions. *E.g.,* Manhart v. City of Los Angeles Dept. of Power & Water, 553 F.2d 581, 587-88, (9th Cir. 1976), *aff'd and rev'd on other grounds,* 435 U.S. 702 (1978); Fitzgerald v. Sirloin Stockade, Inc., 22 FEP Cases 262, 267 (10th Cir. 1980); EEOC v. Aetna Insurance Co., 22 FEP Cases 607, 611 n. 5 (4th Cir. 1980) (Equal Pay Act claim only); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978). In other cases, the courts stated in dicta that Title VII is limited to equal work challenges. *E.g.,* DiSalvo v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593, 596 (8th Cir. 1978); and Orr v. Frank R. MacNeil & Son, Inc., 511 F.2d 166, 171 (5th Cir. 1975); *cert. denied,* 423 U.S. 865 (1975). As we have noted, the issue has generally not been directly confronted for adjudication on a record similar to the present one. A variety of reasons may

house has practiced. Moreover, we believe that the evidence suggests otherwise.

Accordingly, we will reverse the judgment of the district court and will remand for further proceedings.[20]

VAN DUSEN, *Circuit Judge,* dissenting.

I respectfully dissent. The majority opinion describes a case in which sex-based wage discrimination and liability under §703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) (1976), will be established by evidence that an express policy of sex-based wage discrimination exists at Westinghouse's Trenton facility.[1] If I understand the case to involve

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explain this. In some instances, the claimant met the equal work claim and there would have been no need to decide any other approach. *E.g.,* Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970); and Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 184-86 (7th Cir. 1979); *DiSalvo,* 568 F.2d at 596-97; and *Laffey,* 567 F.2d at 445. In some cases the plaintiff failed to meet the equal work standard and the facts suggest the plaintiff would not have been able to establish facts similar to the facts of this case. *E.g.,* Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977); Calage v. University of Tennessee, 544 F.2d 297 (6th Cir. 1977); *Orr.* Finally, in some of the cases the plaintiffs never sought to challenge the equal work standard. *E.g., DiSalvo; Calage; Manhart.*

20. We make no judgment as to whether, on the merits, the plaintiffs will be able to sustain their burden of proof. We rule merely that they must be given the opportunity to present the case to a fact-finder to evaluate their evidence.

1. The majority's language also describing plaintiffs' claim as a §703(a)(2), §2000e-2(a)(2), "classification" case is inaccurate. The plaintiff's complaint in-

only this issue, I would join in the court's order.[2] However, I understand the Union to be asking this court to adopt the position that a plaintiff can prove a claim under Title VII on a sex-based wage discrimination theory through comparisons of the worth of comparable work; that is, through comparisons of the value of different jobs to the wages paid for performing those jobs.

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cludes five counts. Each count alleges a §703(a)(1), §2000e-2(a)(1), compensation violation. A §703(a)(2) classification violation is nowhere mentioned in the plaintiffs' papers (8a-33a).

2. The majority's belief that Title VII must be read more broadly than the Equal Pay Act in order that certain sex-based wage discrimination not go unremedied is open to question. The Equal Pay Act states:

> "No employer . . . shall discriminate between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ."

The majority implies that an employer, who explicitly states that he is paying a group of his female employees less than he would if they were males, is not liable under the Equal Pay Act so long as no male employees performing substantially equivalent work exist. I believe that the Equal Pay Act does prohibit such sex-based wage discrimination. It is not necessary that every Equal Pay Act violation be established through proof that members of the opposite sex are currently performing equal work for greater pay. Although the typical Equal Pay case involves a claim that men and women are working contemporaneously at the same job for disparate compensation, the courts have also found Equal Pay violations by looking to the wages paid the predecessors or successors of plaintiffs. *Bourque v.*

Since I believe Congress adopted the Bennett Amendment, which is included in §703(h) of Title VII, 42 U.S.C. §2000e-2(h), to prevent plaintiffs from proving sex-based wage discrimination claims under Title VII with evidence of the worth of comparable work, I dissent.

Powell Electrical Manufacturing Co., 23 E.P.D. ¶30,891 (No. 1247, 5th Cir., May 5, 1980) (violation of Equal Pay Act and Title VII established by comparison with wage of predecessor and statements of intent to engage in sex-based wage discrimination), and *DiSalvo v. Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978) (violation of Equal Pay Act and Title VII established by comparison with wage of successor). I interpret an employer's statement, "if my female employees were males, I would pay them more," as an admission that men performing equal work, with the same qualifications, in the same working conditions, would be paid more than the current female employees. This situation is covered by the Equal Pay Act. The hypothetical males referred to by the employer suffice as the better paid employees of the opposite sex required by the statute. To require the female employees to wait until better paid male successors are in fact hired by the employer before bringing a claim would be manifestly unjust. I am confident that Congress did not intend such overt discrimination to go unremedied by the Equal Pay Act. I believe that the majority's reliance on the inability of the Equal Pay Act to accommodate this situation is unjustified.

The only case which I have found addressing this question is *Rinkel v. Assoc. Pipeline Contractors*, 17 F.E.P. cases 224, 226 (D. Alaska 1978). The district court in *Rinkel* concluded that in order to establish liability under the Equal Pay Act it was necessary that a member of the opposite sex actually perform equal work, despite explicit statements of intent to discriminate in wages on the basis of sex by the employer. I do not believe the court adequately considered the policies of the Equal Pay Act in reaching this conclusion and was in error.

Appendix A.

I.

As I understand the record in this case, the Union's case can only be proved through evidence of the worth of comparable work. The Union's sole evidence of an express policy of discrimination at the Trenton facility is a statement from 1939. Although the Union acknowledges that there have been changes in the content of the various jobs and adjustments to the pay scales over the last 40 years,[3] they argue that, with comparable work evidence, they can prove that the 1939 policy has been perpetuated. They state that "[j]ob comparisons would play only a limited role in plaintiff's proof—establishing that discriminatory wage reductions for women first instituted by Westinghouse some forty years ago have not been eliminated with the passage of time, and that the present system still embodies intentional discrimination."[4] Although the Union downplays the importance of the comparable work evidence, it is the sole evidence available to them to demonstrate that the discrimination has continued. Thus, the evidence of comparable work will be the central focus of the Union's case.[5]

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3. Brief for appellants at 10.

4. Appellants' Reply Brief at 6.

5. The Union explained its proposed method of proof and the importance of comparable work evidence in response to the defendant's interrogatories, as follows:

> "The low rates for all female jobs—including the few classified above Labor Grade 3—are not justified by the nature and content of the jobs, but are solely the result of sex discrimination. *Plaintiffs will establish this fact by expert testimony after further discovery and investigation, and it is not possible to describe at this point the comparisons which plaintiffs will make at trial between various*

Accordingly, the question presented by this case is whether a sex-based wage discrimination claim can be made out under Title VII on the basis of evidence of

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jobs. However, examples of job comparisons which plaintiffs would make on the basis of their present knowledge are contained in the answers to Interrogatories Nos. 11-16."

(69a, emphasis added.)

An example of the job comparisons to be made is set out in answer to Interrogatory No. 12.

"[O]n the basis of their present knowledge, plaintiffs would compare the Mount Machine Operator and the Janitor jobs in the following terms relevant to their claim that the job of Mount Machine Operator is discriminatorily underpaid:

"A Mount Machine Operator must work at a fast pace feeding flares, coils, wires and exhaust tubing into her machine. This demands great skill and dexterity, especially the coil feeding. The operator must be able to work from a schedule sheet, must notify other personnel of type changes and the anticipated time of changeovers, must keep production records, must analyze and record shrinkage, and must take note of irregularities in the machine's operation and in the materials she receives. The operator must clear jams and remove defective parts with tweezers, relight fires, and do other such maintenance functions. The job entails several other duties: traying the finished mounts, stamping and counting flimsies, cleaning machine parts, pushing bulb hampers to the sealex position, dumping glass particles into a cullet box and pushing the box to the aisle and stocking it for the cullet collector to empty, repairing defective mounts, delivering trayed mounts to the sealex position, obtaining materials, sweeping the work area, etc. Much of this work is heavy; for example, the lifting of heavy boxes of flares and tubes, and the moving of even heavier cullet boxes and bulb hampers. The work is constant, and involves tension and pressure,

comparable work. Because I believe the Bennett Amendment attempts to incorporate into Title VII the Equal Pay Act's rejection of the comparable work approach, I conclude the answer to the question is no.[6]

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since the operator must keep up with the machine and the plant's production depends on the operator's ability to keep the machine fed and running, and to identify problems in the operation of the machine as well as defects in the materials which go into the machine and the mounts which come out of it.

"In contrast, the Janitor job involves virtually no skill. Moreover, the janitors can work at a leisurely pace, and often have no duties to perform for substantial periods of time. And of course, the performance of the janitors does not have a direct effect on production, unlike the Mount Machine job. Furthermore, for the most part the janitor's work is very light. Janitors have seldom been required to sweep the factory areas (except the warehouse janitor), because this work is done by the operators in the areas. Thus the sweeping done by janitors is generally confined to offices, wash rooms, stairways, cafeteria, etc. The cleaning done by the janitors is of a light nature, requiring little exertion. The same is true of the janitors' duties with respect to emptying cigarette containers, waste-paper baskets, etc. And equipment such as powered sweepers and automatic hand tracks minimize the effort required in the few areas where the work might otherwise be heavy."

(75a-77a)

6. Even if the majority's perception of this case, that it raises only the question of whether sex-based wage discrimination can be proved by way of statements of intentional wage discrimination in the absence of an equal work violation, is correct, the majority's analysis will permit sex-based wage discrimination claims to be brought solely on the basis of evidence of comparable work. By interpreting the Bennett Amendment to refer

Appendix A.

II.

The proper analysis of the question begins with an understanding of Congress' position on comparable work in the Equal Pay Act. It is clear from the legislative history of the 1963 Equal Pay Act amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d), that Congress rejected the comparable work doctrine at that time. *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1173-76 (3d Cir. 1977). Congress did not want and "did not authorize the Secretary [of Labor] or the Courts to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth." *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 285 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975). Congress rejected the doctrine at least in part due to the difficulty of ascertaining the worth of comparable work and the difficulty of ascertaining the impact on wages of the supply and demand for labor.[7] The determination of proper wages when equal work did not exist was deemed better left to the market place than to a judicial fact finder.

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only to the four exceptions in the Equal Pay Act and by holding that Title VII need not be read *in pari materia* with the Equal Pay Act, the majority has necessarily decided that Title VII's prohibition against sex discrimination in wages is not limited by the Equal Pay Act's equal work requirement. Accordingly, we must confront the comparable work issue in this case.

7. The difficulty of ascertaining the proper wage for a job by comparing it to the wage paid for dissimilar work has been well documented. *See Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977), and Lindsay, *Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine* (1980), published by the Law and Economics Center of the University of Miami.

One year later the same Congress passed the Civil Rights Act of 1964, a broad anti-discrimination statute prohibiting, *inter alia,* sex discrimination in employment. It is a general principal of statutory construction that legislation addressing the same issue be interpreted *in pari materia* if possible. The Supreme Court has held that under this canon, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' " *Radzanower v. Touche, Ross & Co.,* 426 U.S. 148, 153 (1976), *quoting Morton v. Mancari,* 417 U.S. 535, 550-51 (1974). The canon has elsewhere been defined to mean that:

> "In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together."

2A C. Sands, *Sutherland Statutory Construction* §51.02 (4th ed. 1973) (footnotes omitted).

In my opinion, the Equal Pay Act and Title VII should be construed *in pari materia.* They both deal with the same subject matter, sex-based wage discrimination. The Equal Pay Act deals solely with sex-based wage discrimination and was enacted after extensive legislative investigation of the issue. Title VII, by contrast, is general anti-discrimination legislation and was passed without investigation of the specific problem of

sex-based wage discrimination. In Title VII there is no express repeal of the equal work requirement of the Equal Pay Act. Rather, the legislative history of Title VII shows an actual intent by the floor leaders of the legislation to avoid conflicts between the two statutes. In fact, Title VII expressly refers to the Equal Pay Act and attempts to harmonize the two statutes through the Bennett Amendment.

Further support for construing the statutes *in pari materia* is found in the EEOC's contemporaneous agency regulation, 29 C.F.R. §1604.7(a) (1965). It expressly stated that "Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable." The current EEOC regulations also include a provision expressly addressing the relationship between Title VII and the Equal Pay Act, 29 C.F.R. §1604.8 (1978). Moreover, every court of appeals which has addressed the question of the applicability of the *in pari materia* canon to the interpretation of these statutes, including a prior decision of the Third Circuit, has held that the canon does apply. *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 596 (8th Cir. 1978); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 446 (D.C.Cir. 1976); and *Orr v. MacNeill & Sons, Inc.*, 511 F.2d 166, 170 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975). All of these factors lead me to conclude that the canon is applicable to the issue in this case and requires us to interpret Title VII in a fashion consistent with the Equal Pay Act's rejection of the comparable work doctrine.

It is from this foundation that I begin my analysis of the Bennett Amendment. The Bennett Amendment provides as follows:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid employees of such employer, if such differentiation is authorized by the provisions of [the Equal Pay Act] Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

This provision was added in response to Congressman Smith's amendment, which included sex in the classifications protected under §703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), from employment discrimination.

As the majority discusses extensively, the dispute in interpreting the Bennett Amendment concerns the meaning of the word "authorized" in the phrase "authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938." The majority notes that the word "authorized" is open to two interpretations. It may refer to the four exceptions expressed in the Equal Pay Act, as the majority concludes, or it may limit the prohibition against sex-based wage discrimination to situations where the Equal Pay Act is also violated, thus preventing the use of comparable work evidence. A review of the aids to interpretation leads me to the latter conclusion.

A.

Statutory construction begins with an analysis of the language of the statute. *Lewis v. United States,* 48 U.S.L.W. 4205, 4207 (S.Ct. Feb. 27, 1980). The word "authorized" normally describes something that is af-

firmatively endorsed. However, as Westinghouse argues, an alternative definition is "to permit a thing to be done in the future."[8] I do not believe the common meaning of the word is so clear as to reveal conclusively the correct interpretation of the statute.

Moreover, the majority's definition of "authorized" renders the Bennett Amendment largely redundant, a construction which is to be avoided. *F.A.A. v. Robertson,* 422 U.S. 255, 261 (1975). Section 703(h) of Title VII, §2000e-2(h), contains two sentences. The Bennett Amendment is the second sentence. The first sentence explicitly provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system or a system which measures earning by quantity or quality of production. . . ." Nonetheless, the majority views the Bennett Amendment as solely incorporating the following provision under the Equal Pay Act: "[n]o employer . . . shall discriminate . . . [on the basis of wages] . . . except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ." In light of the first sentence of §703(h), the majority's interpretation makes the Bennett Amendment surplusage. Based on these factors, I believe the statutory language itself is inconclusive.

B.

The second aid to interpretation is the legislative history. Two days after Congressman Smith's amend-

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8. Black's Law Dictionary (4th ed. 1968) at 169.

ment to Title VII including sex as a protected classification was adopted, the bill passed the House. The bill bypassed the Senate committee system and was presented to the full Senate for initial consideration. The first discussion of the issue of discrimination in compensation based on sex was presented on April 4, 1964, by Senator Clark, one of the bill's floor managers, in response to questions raised by Senator Dirksen. Senator Clark posed the following question and answer:

> "Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. *They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.*
>
> "Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*

110 Cong. Rec. 7217 (1964) (emphasis added). As I read the emphasized portions of the question and answer, they demonstrate an intent to preserve the Equal Pay Act's requirement that proof of equal work be a prerequisite to a sex-based wage discrimination claim under Title VII.

Subsequently, on June 12, 1964, the Bennett Amendment was introduced in the Senate. The colloquy at the time of introduction and adoption is somewhat ambiguous.[9] Senator Bennett summarized the import of his amendment by saying:

> "Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflict between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
>
> "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."

110 Cong. Rec. 13647 (1964). This statement is open to different interpretations because Senator Bennett did not specify the provisions of the Equal Pay Act to which he was referring. I believe, however, the most logical interpretation of the statement is that Senator Bennett was referring to the equal work provisions of the Equal Pay Act.[10]

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9. The text of the colloquy at the time of introduction and adoption is set forth at note 11 of the majority opinion.

10. Senator Dirksen's statement, which is relied on by the majority, is also ambiguous. Senator Dirksen said, "all that the pending amendment does is recognize those exceptions, that are carried in the basic act." It is unclear what "the basic act" refers to. Moreover, it was Senator Dirksen who first raised the objection, answered by Senator Clark, that Title VII would reject the equal work requirement. These facts leave the majority's interpretation open to question.

The Senate's amendment was then sent to the House for approval. In the House Congressman Celler, floor leader of the bill, explained that the Bennett Amendment "provides that compliance with the Fair Labor Standards Act as amended satisfies the requirements of the title [Title VII] banning discrimination because of sex." 110 Cong. Rec. 15896 (1964). As the majority notes, this statement also is open to varying interpretations. Again, I believe that the most logical interpretation of this remark is that complying with the Equal Pay Act would preclude liability under Title VII for all sex-based wage discrimination claims. The House adopted the provision and the bill was eventually enacted into law.

One year later, in 1965, Senator Bennett submitted a memorandum to be published in the Congressional Record clarifying the meaning of his amendment. The final words of the memorandum are that "[s]imply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965).[11] As the majority notes, this statement explicitly supports Westinghouse's view. Although I am aware of the danger of relying on legislative history which is presented after passage of a law, the Supreme Court cases do not dismiss such history as irrelevant. *Haynes v. United States,* 390 U.S. 85, 87 n.4 (1968); *Galvan v. Press,* 347 U.S. 522, 536-27 (1954); and *Sioux Tribe v. United States,* 316 U.S. 317, 329-30 (1942). When the author of a piece of legislation, a short time after its passage, makes a clarifying state-

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11. The full text of the statement is set out in the majority opinion at note 12 at p. 21.

ment which is not inconsistent with the prior, ambiguous legislative history, I believe the statement should be given weight.[12] In this case it lends support to Westinghouse's interpretation. In sum, when considered in full, I believe the legislative history supports Westinghouse's view.

C.

The third aid to interpretation is the administrative interpretation of the statute by the Equal Employment Opportunity Commission (EEOC), the regulatory body charged with enforcing the Civil Rights Act. The situation before us parallels that presented to the Supreme Court in *General Electric Co. v. Gilbert,* 429 U.S. 125, 142 (1976). In *Gilbert* the Supreme Court discounted the weight to be given EEOC's 1972 Title VII regulations addressing pregnancy benefits, because they were inconsistent with EEOC's 1965 regulations on the issue. In this case the EEOC also amended its regulations in 1972. At that time the EEOC omitted the express requirement of proof of equal work articulated in the 1965 regulation concerning the Bennett Amendment.[13] The current regulation is silent concerning the equal pay requirement, and thus sheds little light on the issue pre-

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12. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 354 n. 39 (1977), is not to the contrary. It states in pertinent part:

> "The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted §703(h) in 1964, unmistakable in this case, that controls."

13. The full text of the two regulations is set forth in the majority opinion at notes 16 and 17 at p. 26.

sented by this case.[14] Despite this, recent EEOC rulings and the amicus brief field in this court demonstrate that the EEOC currently supports the Union's position that the Bennett Amendment does not incorporate the equal work requirement into Title VII. The prior regulation, however, clearly supported Westinghouse's position. The 1965 regulation stated in part that, "the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." 29 C.F.R. §1604.7(a) (1965). This regulation shows that in 1965 the EEOC believed that the Bennett Amendment incorporated the equal work requirement into Title VII. Although the recent rulings may stand as some authority for the Union's position, in light of *Gilbert,* at 143, I believe their weight is substantially reduced, and that this 1965 regulation should be considered.

D.

The case law is the last aid to interpretation. It has been reviewed extensively by both the majority and the district court, *International Union of Electrical Workers v. Westinghouse Electric Co.,* 19 F.E.P. Cases 450 (D.N.J. 1979). Their reviews demonstrate that there is a conflict between the circuits on the issue currently in

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14. The majority reads 29 C.F.R. §1604.8(a) (1978) as eliminating the equal work requirement. I understand this subsection to address solely the question of which employees are covered under Title VII and the Equal Pay Act. Title VII protects some workers not protected by the Equal Pay Act. Section 1604.8(a) merely says that the Bennett Amendment does not serve to limit the coverage of Title VII to those employees covered by the Equal Pay Act.

controversy. Until the decision in *Gunther v. County of Washington,* 602 F.2d 882 (9th Cir. 1978), *aff'd upon petition for rehearing,* No. 76-3448 (9th Cir., May 1, 1980), no court of appeals had held that a Title VII claim of sex-based wage discrimination could be made out without proof of equal work. The opposite position had uniformly been taken. *Lemons v. Denver,* 22 F.E.P. Cases 959 (10th Cir. 1980); *Orr v. MacNeill & Sons, Inc.,* 511 F.2d 166, 171 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975); *Ammons v Zia Co.,* 448 F.2d 117, 120 (10th Cir. 1971) (Aldisert, J., sitting by designation); and *Keyes v. Lenoir Rhyne College,* 15 F.E.P. Cases 914 (W.D.N.C. 1976), *aff'd,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977). Although the *Gunther* opinion treats the problem in more detail than the other cases, it fails to discuss the application of the *in pari materia* canon of statutory construction to the issue. This failure undermines the force of the Ninth Circuit's analysis. In light of this review, I consider the case law another factor in support of Westinghouse's interpretation.

In sum, I believe that when all the aids to interpretation are considered and when the canon of *in pari materia* is given proper weight, Westinghouse's interpretation of the Bennett Amendment must prevail.[15]

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15. The majority holds that the *in pari materia* canon is inapplicable to the case at bar. I believe this view leads it to interpret the Bennett Amendment incorrectly. However, even if the majority's limited interpretation of the Bennett Amendment is correct, I believe the *in pari materia* canon compels us to interpret Title VII to include an equal work requirement in sex-based wage discrimination claims, since the Congress in Title VII did not expressly reject the equal work requirement.

III.

In conclusion, I note that read together, Title VII and the Equal Pay Act provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that men and women performing the same work will be paid equally. This approach provides a mechanism for eliminating sex-based wage discrimination, while, at the same time, assuring that the courts and federal agencies will not become entangled in adjudicating the wage rates to be paid for dissimilar jobs—a process in which they have little expertise. The majority's opinion rejects this balanced approach and will allow claims based on the valuation of comparable work. Although the majority's opinion is purportedly limited to cases involving express statements of discrimination, its analysis is not so limited. In order to find a sex-based wage discrimination cause of action under Title VII where one does not exist under the Equal Pay Act, the majority has interpreted the Bennett Amendment to refer only to the four exceptions in the Equal Pay Act and, by not following the canon of *in pari materia*, has rejected the applicability of the policies of the Equal Pay Act to Title VII. Having disposed of both of these limitations on the scope of Title VII, this court has no basis under which to exclude evidence of the worth of comparable work in a Title VII sex-based wage discrimination case.[16] I do not believe Congress intended to overrule the equal work policy of the Equal Pay Act in adopting Title VII, and

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16. As noted above in part I, I believe this is such a case.

accordingly I dissent.[17] I would affirm the district court's order.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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17. My analysis of the limitation of Title VII in the area of sex-based wage discrimination in no way implies that I am unsympathetic to the employment discrimination suffered by many women. While I view such discrimination as a deep-rooted social problem which can and should be remedied, I think the change must come from the legislature. My review of the legislative history convinces me that in passing the Civil Rights Act of 1964 the 88th Congress did not intend to subject employers to liability on claims based on the valuation of comparable work. In light of the still great disparities between the wages of men and women 16 years after the enactment of the Civil Rights Act, Congress may now wish to pass legislation allowing comparable work claims to be brought under Title VII.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1893 and 79-1894

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 449, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 627, an unincorporated association, H. J. ADAMS, GENEVIEVE ARNETT, JOSEPHINE BAKER, MARGE DINNAN BROPHY, HENRIETTA BROWN, DOROTHY M. BURTON, MINNIE CHATMAN, MARY E. COBB, A. CONTENTO, MELVINA COOPER, JEAN CORBIN, NORMA DOYLE, ELEANOR DYE, TANYA FOURSHEE, D. FOWLER, DOROTHY GAINES, MARTHA GANT, MADELINE GIESE, L. M. HARRIS, DOROTHY HAYES, ELEANOR HUNKER, PAULINE LEE, J. LINDENTHAL, OLLIE LITTLE, MADELINE MARTINO, D. P. MASSI, RENA McLEOD, S. McNEIL, PATTI MITCHELL, ROBERTA MOORE, MABEL MORRELL, MILDRED OCIKI, HELEN O'LOUGHLIN, MARY PFISTER, ANN RAHO, R. RAINEAR, P. RUTOWSKI, LORETTA RYAN, J. L. SHELDON, V. VAUGHN, HELEN WALSH, and SHIRLEY WATKINS, on behalf of themselves and on behalf of all persons similarly situated,

v.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("IUE") and Locals 449 and 627,

Appellants in 79-1893

Marge Brophy, Henrietta Brown, Melvina Cooper, Ann Raho Frazier and Helen Walsh, on behalf of themselves and the class they represent,

Appellants in 79-1894

Appendix B.

Sur Petition for Rehearing

Present:

SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM AND SLOVITER, *Circuit Judges.*

The petition for rehearing filed by WESTINGHOUSE ELECTRIC CORPORATION in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing.

BY THE COURT,

/s/ .....
A. LEON HIGGINBOTHAM
Circuit Judge

Dated: October 29, 1980

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, AN UNINCORPORATED ASSOCIATION, ET AL., *Plaintiffs,*

v.

WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION, *Defendant.*

Opinion
(filed February 8, 1979)

BARLOW, *Chief Judge.*

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I. BACKGROUND

This is an action seeking relief for various alleged sexually discriminatory practices and policies of the defendant, Westinghouse Electric Corporation, hereinafter "Westinghouse", at its Trenton, New Jersey plant, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* (as amended), hereinafter "Title VII". It was originally part of a larger action brought in the Western District of Pennsylvania against Westinghouse which alleged similar discriminatory practices at numerous Westinghouse facilities. Those counts involving defendant's New Jersey plants were severed and transferred to this Court.[1] Another count, involving nearly

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1. The original complaint in this action was Civil Action No. 74-570, filed in the Western District of Pennsylvania on June 12, 1974. On October 28, 1975, Counts II-V of that complaint were severed and transferred to the District of New Jersey with the consent of all parties.

identical allegations with respect to Westinghouse's Fairmont, West Virginia plant was transferred to the Western District of West Virginia. The plaintiffs in the present action are a certified class of past and present female production, maintenance, and warehouse employees at Westinghouse's Trenton plant, hereinafter "individual plaintiffs",[2] the International Union of Electrical, Radio and Machine Workers, hereinafter "IUE", and Local 449 of the IUE, hereinafter "Local", the collective bargaining agent of the individual plaintiffs. Presently before the Court is the defendant's motion to dismiss under *Fed. R. Civ. P.* 12(b)(6), or, in the alternative, for partial summary judgment under *Fed. R. Civ. P.* 56(d), directed at those portions of the complaint which allege sex based discrimination in the payment of wages.

Plaintiffs' complaint alleges a pervasive scheme of sex based discrimination at Westinghouse's Trenton, New Jersey plant, all in violation of §703(a) of Title VII, 42 U.S.C. §2000e-2(a).[3] It alleges discriminatory prac-

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2. This Court certified the named individual plaintiffs as representatives of a class of all past and present female production, maintenance, and warehouse employees at the Trenton plant on December 13, 1977.

3. Section 703(a) states:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify his employees, or applicants for employment in any

tices in compensation, job assignments, transfers and promotions, tenure, job classifications and other terms and conditions of employment growing out of an official company policy dating back to 1938. *See* Complaint ¶21. The motion presently before this Court, however, is far narrower than the issues raised by the complaint. It singles out for attack only plaintiffs' allegations of sex based wage discrimination under §703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1).

In pertinent part, Count II of the complaint, relating to Westinghouse's Trenton plant, alleges that Westinghouse:

> willfully and intentionally discriminated against the Plaintiffs . . . in violation of Section 703(a) of Title VII of the Civil Rights Act of 1964 . . . by (a) paying [them] unequal pay in that male employees performing the same or substantially the same work receive higher pay; [and] (b) paying [them] lower rates of pay than would be paid [them] if [their] skill, effort and responsibility were evaluated on the same basis as is used in evaluating work performed by males. . . .

Complaint, Count II, ¶33.

Additionally, the plaintiffs charged that Westinghouse violated section 703(a) by:

> way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a).

> paying [them] solely because of [their] sex, at a rate of pay which is lower than the rate of pay of males whose jobs have been evaluated by the Defendant Westinghouse as having the same number of evaluation points based on education, experience, aptitude, effort, responsibility and working conditions required for the job.

Complaint, Count II, ¶34.[4]

During the course of discovery, however, plaintiffs conceded that, notwithstanding the allegations of the complaint, they did not intend to prove that "any job performed by women employees require[d] 'equal skill, effort and responsibility and [was] performed under similar working conditions as that of a job performed by male employee". *See, e.g.,* Answers of Plaintiff Marge Brophy to Interrogatories by Defendant, Nos. 10, 12, & 16 (filed July 13, 1977); Transcript of Hearing of May 1, 1977 at 34-35 (remarks of Richard Sobol, Esq., counsel for Plaintiff-Unions). Westinghouse brought this motion in response to plaintiffs' admission.[5]

The question presented for decision by this motion is whether a sex based wage discrimination claim may be maintained under Title VII in the absence of allegations

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4. Examination of ¶¶20-21 of Count I of the Complaint reveals that identical allegations were made with regard to defendant's Fairmont, West Virginia plant.

5. Westinghouse styles its motion as one to dismiss or, in the alternative, for summary judgment. Since resort has been made to matters outside the pleadings to establish that there is no material issue of fact as to the payment of unequal wages for substantially equal work, *see Fed. R. Civ. P.* 12(c), we will treat the motion as one for partial summary judgment pursuant to *Fed. R. Civ. P.* 56(d).

that male and female employees are paid disparate wages for the performance of equal or substantially equal work. More specifically, the question is whether the Bennett Amendment to §703(h) of Title VII, 42 U.S.C. §2000e-2(h)[6] limits sex based wage discrimination claims under Title VII to conduct which would also be actionable under the Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d).[7] The answer to the question is purely a matter of statutory construction.[8]

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6. See text at n. 17, *infra,* for the text of §703(h).

7. Section 3 of the Equal Pay Act states, in pertinent part, that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. §206(d)(1).

8. In their briefs and at oral argument Westinghouse suggested that the doctrine of collateral estoppel provides another ground for granting their motion. It appears that in that portion of the original action transferred to West Virginia, Westinghouse brought an identical motion and the court ruled in its favor. *See IUE v. Westinghouse,* Civ. No. 75-62-f(H), unpublished opinion, at 11-18 (N.D.W.V. Nov. 21, 1977), hereinafter the "West Virginia action". This Court requested supple-

II. The Merits of Plaintiffs' Title VII Claim

This Court believes that plaintiffs' allegations of sex based wage discrimination, as clarified by plaintiffs' admission that they do not intend to prove that equal or substantially equal work was performed for unequal pay, are insufficient in law and that defendant's motion should, therefore, be granted.

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mental briefs from all parties in order to consider defendant's contentions. After considering these briefs without benefit of additional oral argument, we do not believe that the doctrine of collateral estoppel is properly applicable on these facts.

Without examining all of the requirements of the doctrine, *see Scooper-Dooper Inc. v. Kraftco Corp.*, 494 F.2d 840, 844 (3d Cir. 1974), it is clear that the issue decided in the West Virginia action is not identical to the issue presently before this Court, notwithstanding the fact that identical questions of law are raised. *See Commissioner v. Sunnen,* 333 U.S. 591, 601-602 (1958). In this case, the job classification and pay scheme used in New Jersey has been challenged under Title VII, whereas the West Virginia action involved a challenge to the scheme in effect in that state. Clearly the two are "separable" as that term is used in *Sunnen, supra,* at 601-602.

This decision reflects our hesitancy to apply collateral estoppel to questions of statutory construction. Doing so will not further the goal of economy of scarce judicial resurces which is at the heart of the doctrine, *see Parklane Hosiery Co. v. Shore,* 47 U.S.L.W. 4079, 4080-81 (U.S. Jan. 9, 1979), since the merits of the issue will be decided on motion, without testimony or trial, and at the expense of little more judicial energy than it takes to decide whether collateral estoppel applies in the first instance. Furthermore, the judicial system best resolves such questions by allowing judges to render their considered opinions based upon their independent evaluation of the factors which go into such a decision, allowing the ordinary rules of stare decisis to govern

Appendix C.

Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1),[9] establishes a broad prohibition against discrimination in hiring, discharge, compensation, terms, conditions or privileges of employment based on race, color, religion, sex or national origin. The year before Title VII was enacted, however, Congress directed its attention to one small subset of this broad spectrum of discriminatory practices and passed the Equal Pay Act of 1963, 29 U.S.C. §206(d).[10] This act was designed to deal only with wage discrimination based on sex and did so by enunciating the now well known "equal pay for equal work" standard. *See, e.g., Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265-55 (3d Cir)., *cert. denied*, 398 U.S. 905 (1970). Congress, desiring to limit the scope of judicial intervention into the business place, rejected a version of the bill which enunciated a "comparable work" standard and adopted instead the "equal work" standard.[11] Under the formulation ultimately adopted

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subsequent application of those decisions in later cases. We therefore decline to estop the plaintiffs from relitigating the legal questions raised in this case and turn to the merits.

9. Cited in n. 3, *supra*.

10. Cited in n. 7, *supra*.

11. H.R. 8898, 87th Cong., 1st Sess. §4 (1962) and H. R. 10226, 87th Cong., 2d Sess. §4 (1962) each provided for the payment of equal wages for the performance of "work of comparable character on jobs the performance of which requires comparable skills . . . ." Later, as H.R. 11677, 87th Cong., 2d Sess. (1962), the bill, after considerable debate, was amended on the floor of the House to substitute the "equal work" formula for "comparable work". 108 Cong. Rec. 14771 (1962). A more complete examination of the history of the Equal Pay Act can be found in the Brief in Support of Defendant's Motion to Dismiss, or, in the Alternative, For Summary Judgment, at 8-13.

by Congress, the Equal Pay Act almost takes the form of a strict liability statute such that proof that men and women perform "substantially equal" work requiring "equal skill, effort and responsibility" and "performed under similar working conditions" for unequal pay establishes a violation without regard to the intent of the employer. *See, e.g., Corning Glass Works v. Brennan,* 417 U.S. 188, 195-97 (1974); *Angelo v. Bacharach Instrument Co.,* 555 F.2d 1164 (3d Cir. 1977). The Act, however, provides four affirmative defenses by which an employer can avoid liability notwithstanding proof of unequal pay for substantially equal work.[12]

Returning to 1964 and the passage of Title VII, Congress was faced with the prospect of enacting a broad statute which would cover conduct already regulated by the narrower prohibitions of the Equal Pay Act,[13] and the problem of determining how the two statutes should relate to one another. Congress' answer to this problem, though not necessarily a solution, was the Bennett Amendment, added to §703(h) of Title VII, 42 U.S.C. §2000e-2(h), which states:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid to employees of such employer *if such differentiation is authorized by the provisions of* [*the Equal Pay Act*]. (Emphasis added.)

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12. See n. 7, *supra,* for the text of these four defenses. Their proper application is not at issue in this case.

13. *See* text at 9-12, *infra.*

The present controversy revolves around the proper interpretation of this amendment.

Westinghouse, in support of this motion, argues that the Bennett Amendment should be interpreted to incorporate the Equal Pay Act's "equal work" formula into Title VII, making the two prohibitions coextensive.[14] Thus a Title VII plaintiff would be required to show that the conduct complained of violated the equal work standard of the Equal Pay Act in order to establish sex based wage discrimination under Title VII. Under this view, the payment of unequal wages to men and women performing "comparable" but unequal work would violate neither the Equal Pay Act nor Title VII.

Plaintiffs, in opposition to Westinghouse's motion, argue that Congress did not intend to incorporate the entire "equal work" formula of the Equal Pay Act into Title VII, but only the four affirmative defenses. This interpretation would allow plaintiffs to show sex based wage discrimination under Title VII even though no violation of the equal work standard of the Equal Pay Act had occurred. Plaintiffs strenuously argued that Congress could not have intended to allow purposeful sex based wage discrimination, on the pretext of keeping the courts out of the business place, when Congress exhibited little concern for judicial interference in the business place when wage discrimination was based on race, color, religion, or national origin rather than on sex.

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14. The two prohibitions would be coextensive only as to the type of conduct prohibited. The two acts have different scopes of coverage, in the sense of employees protected and employers regulated, and provide for different remedies. *See Howard v. Ward City,* 418 F. Supp. 414 (D.N.D. 1976).

Put succinctly, defendant contends that the proper interpretation of the Bennett Admenment requires that any conduct not prohibited by the Equal Pay Act is "authorized" by that act, while the plaintiffs argue that the Equal Pay Act only "authorizes" conduct protected by the four affirmative defenses. To ascertain which of these two views is the correct one, we must examine the relevant legislative history of Title VII, the subsequent administrative interpretations of Title VII, and the cases addressing the issue.

A. *Legislative History of Title VII.*

Briefly set out, the legislative history of Title VII begins with its introduction as H.R. 7152, 88th Cong., 1st Sess., on June 20, 1963. The bill was referred to the House Judiciary Committee and was reported out to the full House on January 31, 1964 with a recommendation that the bill be approved. *See* H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2391, 2401-2408. During all of this time the prohibitions of section 703(a) applied only to race, color, religion and national origin. No mention was made of sex. H.R. Rep. No. 914, *supra.* On February 8, 1964 Congressman Smith of Virginia proposed an amendment to section 703(a) which would include sex among the prohibited bases of discrimination. *See* 110 Cong. Rec. 2484 (1964). The amendment was passed that same day and the entire bill was approved two days later and sent to the Senate without further consideration of the effect of the amendment on the Equal Pay Act.

The bill bypassed the Senate committee system and was presented directly to the full Senate for initial consideration. It was not until this time that concern was first expressed about the relation of the Title VII sex

discrimination ban to the Equal Pay Act. Senator Clark, in response to those expressions of concern, submitted a memorandum to the Senate which assured that "the standards of the Equal Pay Act for determining wage discrimination of course are applicable to the comparable situation under Title VII". 110 Cong. Rec. 7212 (1964). Apparently not completely satisfied with this explanation, Senator Bennett introduced his proposed amendment to section 703(h). The proffered amendment was passed with very little debate, but Senator Bennett clearly stated that "the purpose of my amendment is to provide that in the event of conflicts, the provision of the equal pay act shall not be nullified". 110 Cong. Rec. 13647 (1964).[15]

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15. The complete legislative history of the Bennett Amendment is set forth below:

Mr. BENNETT. Mr. President, I yield myself 2 minutes.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: 'It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

Upon consideration of the Senate amendments to the House bill, Congressman Celler was called upon to explain the purpose of the Bennett Amendment. The Congressman stated that the Bennett Amendment "provides that compliance with the Fair Labor Standards Act as amended satisfies the requirements of the title [Title VII] banning discrimination because of sex". 110 Cong. Rec. 15896 (1964).

As is indicated by this brief examination of the legislative history of the sex discrimination provisions of Title VII, it is clear that Congress did not give the fullest possible attention to the extent to which the sex

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By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand, I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair

discrimination provisions of Title VII were to be coterminous with those prohibitions against discrimination based on factors other than sex. This Court is of the view, however, that, although the legislative history is not dispositive of the issue, it tends to support defendant's view of the statute more strongly than the view put forth by plaintiffs.[16]

Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to.

110 Cong. Rec. 13647 (1964).

1 Plaintiffs stress the fact that Senator Bennett described his amendment as a "technical correction", *see* 110 Cong. Rec. 13647 (1964), and argue that technical corrections do not make drastic changes in the substantive provisions of acts of Congress. *See* Plaintiff Unions' Memorandum in Opposition to Defendant's Motion to Dismiss, at 8. Westinghouse, on the other hand, argues that the amendment was a proper technical correction because it served to confirm Senator Clark's view of the statute, discussed, *supra,* at 10, without benefit of the amendment. *See* Reply Brief in Support of Defendant's Motion to Dismiss, or, in the alternative, for Summary Judgment, at 11. Because of this conflict in interpretations, this Court does not believe the Bennett Amendment's characterization as a "technical correction" to be of particular importance in resolving the issue before us.

Appendix C.

B. *Administrative Interpretations of Title VII.*

Both plaintiffs and defendant argue that their view of the statute is supported by various guidelines issued by the Equal Employment Opportunity Commission [the "Commission"].[17] Defendant's view, the view which this Court believes is most strongly supported by the legislative history of Title VII, appears to be supported by at least the initial Commission interpretations of the Bennett Amendment. In 1965 the Commission promulgated guidelines explaining its view of the scope of Title VII. With respect to sex based wage discrimination, the Commission's guideline interpreted section 703(h) to mean that "the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII".[18]

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17. Although the Commission is not authorized by the Civil Rights Act to promulgate regulations which have the force of law, its expressions of opinion on the statute committed to its care are clearly deserving of consideration by this Court when questions of statutory construction arise. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 141 (1976).

18. 30 Fed. Reg. 14927 (1965). The full text of the guideline, formerly codified at 29 C.F.R. §1604.7 (1965), stated:

> §1604.7 Relationship of Title VII to the Equal Pay Act.
>
> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. *Accordingly, the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is un-*

Notwithstanding this apparently clear expression of the correct interpretation of section 703(h), the Commission has since altered its view. In 1972 a new guideline was issued which adopted language apparently adopting the plaintiffs' view of the statute. This guideline, presently in force, states that "by virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII".[19] The new lan-

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lawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.-119-800.163. Relevant opinions of the Administrator interpreting 'the equal pay for equal work standard' will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

(Emphasis added.)

Subsection (a) makes it clear that it was the Commission's initial view that with respect to sex based wage discrimination, Title VII's only addition to the protection afforded by the Equal Pay Act was in respect to the employees covered by the statute. *See* n. 14, *supra.*

19. 29 C.F.R. §1604.8 (1977). The full text of the guideline reads:

Sec. 1604.8 Relationship of Title VII to the Equal Pay Act.—

guage no longer expressly adopts the equal work formula, but neither does it expressly reject that formula.[20]

Although the 1972 guideline does not expressly reject the "equal work" formula, the present position of the Commission, as illustrated by its past decisions, is clearly in line with plaintiffs' position and rejects the "equal work" formula. *See, e.g.,* [1972] Empl. Prac. Guide (CCH) Empl. Prac. Dec. 71-2629, ¶6300 at 4539. Additionally, it is presently the position of the Secretary

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(a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour division, Department of Labor, but will not be bound thereby. 29 C.F.R. §1604.8.

20. It is unclear whether the 1972 guidelines actually repeal earlier interpretations of the Commission. 29 C.F.R. §1604.1(b) states: "To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled." The 1972 guideline is not expressly inconsistent with the 1965 ruling, in that it does not reject the "equal work" formula. Furthermore, the express incorporation of the four affirmative defenses of §6(d) of the Equal Pay Act, 29 U.S.C. §206(d), is not inconsistent with the 1965 guidelines. The implication is clear, however, that the Commission's omission of language expressly incorporating the "equal work" formula is intended to show that the Commission now disapproves of that language.

of Labor, who submitted a brief as Amicus Curiae, that section 703(h) does not limit Title VII to the equal work standard of the Equal Pay Act. *See* Memorandum of the Secretary of Labor As Amicus Curiae, at 3.

In determining which of the Commission's two views of section 703(h) we should adopt, this Court is directed by the reasoning employed by the Supreme Court in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976). In *Gilbert,* the Court was faced with nearly the identical dilemma which presently faces this Court—i.e., the weight to be given a 1972 Commission guideline which conflicted with earlier agency rulings on the meaning of Title VII's sex discrimination ban. The persuasiveness of the guidelines, the court stated, should "in a particular case depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all of those factors which give it power to persuade, if lacking power to control". *Id.* at 142 *quoting Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).[21]

We conclude, as the Supreme Court concluded in *Gilbert,* that the 1972 guidelines are not persuasive. Although the *Gilbert* case does not enunciate a rule that prior interpretations are to supersede subsequent inconsistent interpretations as the defendant suggests, *see* Brief in Support of Defendant's Motion to Dismiss or, in the Alternative, For Summary Judgment, at 22, it is clear to this Court that the earlier guidelines, under the standards set out in *Gilbert* and *Skidmore, supra,* are en-

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21. It should be noted that *Gilbert* dealt not with two inconsistent Commission guidelines, but with an opinion letter and a subsequent inconsistent guideline. *See* 429 U.S. at 142-43.

titled to greater deference than the subsequent guidelines. The fact that the 1965 guidelines were issued contemporaneously with Title VII while the intent of the Congress which had created the Commission was clearly impressed upon the minds of the commissioners, *see Udall v. Tallman,* 380 U.S. 1, 16 (1965), coupled with the fact that the 1965 guideline expressly addressed the incorporation of the "equal work" formula, while the 1972 guideline seems to avoid the issue, *see* text at 14 and n. 20, *supra,* leads this Court to conclude that the 1965 guideline more nearly reflects the intent of Congress in enacting the limitation set out in section 703(h).

C. *The Case Law*

Finally, this Court is of the opinion that the cases support the interpretation of section 703(h) urged by Westinghouse. Every case involving a Title VII sex based wage discrimination claim to which this Court's attention has been directed has placed upon the plaintiff the initial burden of showing equal work and unequal pay. *E.g., Orr v. MacNeil & Sons,* 511 F.2d 166, 171 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975) ("To establish a case under Title VII it must be proved that . . . there was the performance of equal work for unequal compensation."); *Ammons v. Zia & Co.,* 448 F.2d 117, 120 (10th Cir. 1971) (Aldisert, J.) ("[T]o establish a [Title VII] case one must prove a differential in pay based on sex for performing equal work."); *Molthan v. Temple University,* 442 F. Supp. 448, 455 (E.D. Pa. 1977) ("[A]ny Title VII claim alleging sex based discrimination in salary will fail if the complained of acts do not amount to a violation of the Equal Pay Act."); *Chrapliwy v. Uniroyal, Inc.,* 15 Fair Empl. Prac. Cas. 795, 806 (N.D. Jnd. 1977) ("Under [Title VII] the court's initial

inquiry is always: Are the jobs held by a male and a female substantially equal?"); *Howard v. Ward City,* 418 F. Supp. 494, 503 (D.N.D. 1976) (same); *Di Salvo v. Chamber of Commerce of Greater Kansas City,* 416 F. Supp. 844, 849 (W.D. Mo. 1976) (The question is "whether defendant discriminated in salary between males and females who performed substantially equal work".); *Erickson v. Lustra Lighting Division of I.T. & T.,* 12 Fair Empl. Prac. Cas. 372, 376 (N.D. Cal. 1974) (Initial question is "whether plaintiff performed work substantially equal to that performed by the men . . . ."). Although plaintiffs attempt to distinguish these cases as being "equal pay type cases" not involving allegations of purposeful discrimination, *see* Plaintiff Unions' Memorandum in Opposition to Defendant's Motion to Dismiss at 18, they fail to support their suggested distinction with authority, holding that allegations of purposeful discrimination eliminate the need to show equal work in order to state a sex based wage discrimination claim upon which relief can be granted under Title VII. Furthermore, none of the cases cited by defendant use any language suggesting that unsuccessful plaintiffs, who had failed to prove equal work, could nevertheless proceed under Title VII on any other basis.

Those cases upon which plaintiffs rely for the proposition that the Bennett Amendment incorporates only the four Equal Pay Act affirmative defenses and not the "equal work" standard, *Laffey v. Northwest Airlines,* 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978); *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702 (1978), do not hold that a Title VII claim may be stated without a showing of equal work. *Laffey,* for example, superficially supports plaintiffs' position when it states that "a sex-predicated wage

differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the equal pay act". 567 F.2d at 446. This statement, however, is in response to an argument not pressed before this Court. In *Laffey,* the defendant had argued that sex based wage discrimination claims were cognizable only under the Equal Pay Act and that Title VII had no applicability unless the employees were not covered by the Equal Pay Act. *See* 567 F.2d at 444-45.[22] The court rejected this argument and then went on to review the district court's finding that the jobs held by male and female employees were "equal", apparently on the assumption that such a finding was necessary to allow plaintiffs any relief. *See id.* at 446, 453-54.

Likewise, the Supreme Court's recent decision in *Manhart, supra,* 435 U.S. 703 does not aid plaintiffs.[23] In *Manhart* the issue presented was whether a fixed benefit pension plan which required greater employee contributions from women than men violated Title VII. Clearly, the pension benefits were "wages or compensation" under section 703(h) so that the Equal Pay Act applied to the resolution of the issue. 435 U.S. at 712

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22. The defendant's purpose in pressing this argument in *Laffey* apparently was to minimize its potential liability. Both Title VII and the Equal Pay Act authorize an award of back pay to redress any violation proved, and under the circumstances of that case the period for which back pay could have been awarded was longer under Title VII than under the Equal Pay Act. *See* 567 F.2d at 458, 466-68.

23. Plaintiffs actually relied upon the decision of the Court of Appeals for the Ninth Circuit, 553 F.2d 581 (1976), which was affirmed in part and reversed in part by the Supreme Court, 435 U.S. 702, after oral argument was heard in this case.

n. 23. From the outset, however, it had been conceded that men and women performed equal work for unequal pay. What was at issue was whether one of the four affirmative defenses of the Equal Pay Act saved what the defendants conceded would otherwise be a violation. *Id.* at 711-12. The Court found none of the defenses applicable and struck down the plan. *Id.* at 717. In light of the above discussion, we do not believe that *Manhart* is helpful to plaintiffs in this action.

It is therefore this Court's opinion that the case law, as well as the legislative history and prior administrative interpretations of the Commission, all support Westinghouse's contention that the Bennett Amendment incorporated the "equal work" standard of the Equal Pay Act into Title VII. *Accord,* the West Virginia action, *supra,* n. 7, at 17; *Equal Employment Opportunity Commission v. Colby College,* 439 F. Supp. 631 (D. Maine 1977), *vacated and remanded on other grounds,* 47 U.S.L.W. 2417 (1st Cir. Jan. 9, 1979). In *Colby College,* Judge Gignoux stated:

> Both the language of the Bennett Amendment and its legislative history disclose the plain intent of Congress to avoid subjecting employers to two conflicting standards, those of Title VII and those of the then recently enacted Equal Pay Act, and to provide that any possible conflict between the requirements of Title VII and of the Equal Pay Act is to be resolved in favor of the Equal Pay Act.

439 F. Supp. at 634-35.

We believe that our holding is required if we are to effectuate Congress' intent and to refrain from subjecting employers to two potentially conflicting standards regarding sex based wage discrimination.

Appendix C.

Before closing this opinion, we would like to briefly comment on plaintiffs' argument that Congress could not conceivably have intended to isolate one form of purposeful discrimination and exempt it from the broad prohibitions of Title VII. They refer to the hypothetical situation whereby, given this Court's decision, an employer could isolate a job category which was traditionally all female, arbitrarily cut the wages of that job class in half for the sole reason that its holders were female, and yet not run afoul of the broad remedial provisions of Title VII. *See* Plaintiff Unions' Memorandum in Opposition to Defendant's Motion to Dismiss at 9. Even assuming that this would in fact be true, such discrimination could not be maintained. Title VII would still prohibit sex discrimination in hiring, firing, promotion, transfer, classification, and terms and conditions of employment, and any attempt to perpetuate the effects of such purposefully discriminatory yet allegedly lawful activities would run afoul of these prohibitions. We therefore do not believe that our decision will have the dire consequences predicted by the plaintiffs.

Appendix C.

CONCLUSION

In conclusion, therefore, we have ruled that allegations and proof of unequal pay for unequal, but comparable, work does not state a claim upon which relief can be granted under section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1). Since plaintiffs have admitted that they cannot prove that the jobs held by men and women for which unequal pay was given were substantially equal and required equal skill, effort and responsibility, and which were performed under similar working conditions, defendant's motion for partial summary judgment must be, and it hereby is, granted.

Defendant will submit an appropriate order.

/s/ .....
George H. Barlow
Chief Judge

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AN UNINCORPORATED ASSOCIATION, ET AL.,
Plaintiffs,
v.
WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION,
Defendant.

Order Granting Defendant's Motion for Partial Summary Judgment

(Filed March 14, 1979)

Defendant Westinghouse Electric Corporation, in accordance with Rules 12(b) and 56 of the Federal Rules of Civil Procedure, moved the Court to dismiss or, in the alternative, to enter summary judgment on behalf of Defendant with respect to all claims made in Count Two relating to rates of pay, unequal pay or compensation. The plaintiffs opposed the motion. After a hearing and consideration of the record herein, the Court rendered its written Opinion of February 8, 1979, holding that Defendant's motion for summary judgment must be granted.

Accordingly, pursuant to the Court's opinion of February 8, 1979 and since there is no genuine issue of

material fact presented, it is the ORDER of this Court that the motion of Defendant for summary judgment with respect to claims regarding discrimination in pay or compensation be, and hereby is, granted.

/s/ .....
George H. Barlow
Chief Judge

Dated: March 14, 1979

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 449, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 627, an unincorporated association, H. J. ADAMS, GENEVIEVE ARNETT, JOSEPHINE BAKER, MARGE DINNAN BROPHY, HENRIETTA BROWN, DOROTHY M. BURTON, MINNIE CHATMAN, MARY E. COBB, A. CONTENTO, MELVINA COOPER, JEAN CORBIN, NORMA DOYLE, ELEANOR DYE, TANYA FOURSHEE, D. FOWLER, DOROTHY GAINES, MARTHA GANT, MADELINE GIESE, L. M. HARRIS, DOROTHY HAYES, ELEANOR HUNKER, PAULINE LEE, J. LINDENTHAL, OLLIE LITTLE, MADELINE MARTINO, D. P. MASSI, RENA McLEOD, S. McNEIL, PATTI MITCHELL, ROBERTA MOORE, MABEL MORRELL, MILDRED OCICKI, HELEN O'LOUGHLIN, MARY PFISTER, ANN RAHO, R. RAINEAR, P. RUTKOWSKI, LORETTA RYAN, J. L. SHELDON, V. VAUGHN, HELEN WALSH, and SHIRLEY WATKINS, on behalf of themselves and on behalf of all persons similarly situated,

Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation,

Defendant.

Appendix D.

Opinion

FISHER, *Chief Judge.*

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Appendix D.

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Amicus Curiae

On March 14th, 1979, this Court entered an order granting partial summary judgment in favor of the defendant Westinghouse Electric Company on portions of Count II of the complaint. In so doing, the Court held that plaintiffs could not prove a claim upon which relief could be granted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, by alleging and proving intentional sex-based wage discrimination which did not violate the "equal pay for equal work" standard of the Equal Pay Act, 26 U.S.C. § 206. Presently before the Court is plaintiff's motion to have this ruling certified as a final judgment for purposes of appeal pursuant to *Fed. R. Civ. P.* 54(b). The Equal Employment Opportunity Commission, which has been granted leave to appear and participate as amicus curiae, supports the plaintiff's motion.

Certification under Rule 54(b) requires, first, that there be multiple claims for relief asserted against a single defendant;[1] second, that one or more but less than

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1. Orders which finally adjudicate a claim against a single defendant may also be certified as final judgments in suits against multiple defendants. *Fed. R. Civ. P.* 54(b). Since this is not the case here this provision of Rule 54(b) is not relevant.

all of the claims for relief be finally determined; and, third, that there is no just reason for delaying the appeal. *See Sears Roebuck & Co. v. Mackey,* 351 U.S. 427 (1956); 10 Wright & Miller, *Federal Practice and Procedure:* Civil § 2656. The parties do not dispute that the first two of these three requirements are met. The plaintiffs assert multiple claims for relief against the defendant, and the Court's ruling on the sex-based wage discrimination claim of Count II of the complaint constitutes a final judgment with respect to one of those claims. *See I.U.E. v. Westinghouse Electric Co.,* unpublished opinion, Civ. Action No. 75-62-F (N.D. W.Va. April 28, 1978). *Cf. Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976). All that remains to be determined, therefore, is whether there is no just reason for delaying the appeal in this matter.

The law in this circuit has long been that certification under Rule 54(b) is the exception rather than the rule, and that final judgment should be entered only in the "infrequent harsh case" as an instrument for the improved administration of justice and not routinely or as an accommodation to counsel. *See Panichella v. Pennsylvania Railroad Co.,* 252 F.2d 452 (3d Cir. 1958). This interpretation of Rule 54(b) was re-affirmed by the Third Circuit Court of Appeals in *Allis-Chalmers Corp. v. Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975), and again in *Curtiss-Wright Corp. v. General Electric Co.,* Nos. 78-2179, -2293 (3d Cir. April 17, 1979). The burden is on the party seeking certification to show that this is the infrequent harsh case meriting a favorable exercise of this Court's discretion. *Allis-Chalmers, supra,* 521 F.2d at 365.

The Court's task is to examine those factors which are peculiar to this case in order to determine whether they counterbalance the general judicial policy against piecemeal litigation and appeals. *Allis-Chalmers* provides instructions in the form of a non-exclusive list of five factors to be considered:

> (1) the relationship between the adjudicated and unadjudicated claims;
>
> (2) the possibility that the need for review might or might not be mooted by future developments in the district court;
>
> (3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
>
> (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; and
>
> (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time for trial, frivolity of competing claims, expense and the like.

Allis-Chalmers, supra, at 364. *See also Myers & Watters Co. v. E.I. duPont de Nemours & Co.,* 449 F. Supp. 411 (E.D. Pa. 1978).

Considering these factors in light of the present facts we note that the fourth factor, which was so important in denying certification in *Allis-Chalmers* and *Curtiss-Wright,* is altogether lacking here. The third factor favors certification because a reviewing court will not be obliged to consider this issue a second time on an appeal after a trial on the remaining claims. Likewise, although the adjudicated and unadjudicated claims are

related, in the sense that all are Title VII claims of sex discrimination arising out of the same series of transactions, they are sufficiently distinct to permit certification. The claim sought to be certified is one of statutory construction only, and does not deal with the complicated factual issues at the heart of the unadjudicated claims. These factors, therefore, all seem to favor certification.

Plaintiffs additionally argue that the delay in the appeal of this claim will prejudice their ability to proceed to trial should the ruling be reversed. They argue that the jobs at issue are being phased out, thereby interfereing with discovery and proof at a later date Delay will also cause witnesses to become unavailable, as well as the potential class claimants in subsequent stage II proceedings.

The EEOC, in support of the motion, argues that our decision involved a "novel issue" which is likely to recur.[2] They would like the benefit of a higher court's ruling in order to aid them map out their future actions with respect to such claims.

Westinghouse strenuously opposes the motion. They contend that certification will prejudice them in that they will be forced to litigate in two arenas at one time; that the attention and energy of the parties will be

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2. Westinghouse takes issue with this contention. Although I believe that the cases support the late Judge Barlow's decision, with the exception of the action involving Westinghouse's Fairmont plant the cases do not squarely decide the issue presented here. Without indicating any lack of conviction as to the correctness of the prior decision, the prior Third Circuit decisions do not appear to be "on all fours" with the factual setting of this case.

diverted from a trial on the remaining claims thus delaying the resolution of the major portion of the case; and that possible settlement will be delayed. They argue that certification should not be granted where the moving party has not demonstrated any hardship or injustice which would be alleviated by an immediate appeal. *See Vasquez v. Ferre,* 410 F. Supp. 1385, 1387 (D.N.J. 1976). An affidavit is submitted rebutting plaintiffs' claim that they will be prejudiced by a delay in the appeal. The rebuttal is based primarily on the argument that plaintiffs' new-found concern for delay is inconsistent with their prior conduct in prosecuting this action.

Although I am mindful that the record reveals that plaintiffs have not been diligent in prosecuting this case, I believe that certification is a proper exercise of discretion. The factors articulated above indicate that the general policy against piecemeal appeals is not vitiated by certifying this claim as a final judgment. Although the fact that this might present a "novel question" is not alone sufficient to justify certification, *see Vasquez, supra,* 410 F. Supp. at 1387, I believe that some solicitude toward the EEOC's position is desirable. Taking these two factors together, I believe that this order should be certified as a final judgment pursuant to *Fed. R. Civ. P.* 54(b). The Court will enter an order to that effect.

Dated: April 30, 1979.

Appendix D.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 449, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, Local 627, an unincorporated association, H. J. ADAMS, GENEVIEVE ARNETT, JOSEPHINE BAKER, MARGE DINNAN BROPHY, HENRIETTA BROWN, DOROTHY M. BURTON, MINNIE CHATMAN, MARY E. COBB, A. CONTENTO, MELVINA COOPER, JEAN CORBIN, NORMA DOYLE, ELEANOR DYE, TANYA FOURSHEE, D. FOWLER, DOROTHY GAINES, MARTHA GANT, MADELINE GIESE, L. M. HARRIS, DOROTHY HAYES, ELEANOR HUNKER, PAULINE LEE, J. LINDENTHAL, OLLIE LITTLE, MADELINE MARTINO, D. P. MASSI, RENA McLEOD, S. McNEIL, PATTI MITCHELL, ROBERTA MOORE, MABEL MORRELL, MILDRED OCICKI, HELEN O'LOUGHLIN, MARY PFISTER, ANN RAHO, R. RAINEAR, P. RUTKOWSKI, LORETTA RYAN, J. L. SHELDON, V. VAUGHN, HELEN WALSH, and SHIRLEY WATKINS, on behalf of themselves and on behalf of all persons similarly situated,

Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation,

Defendant.

Appendix D.

Rule 54(b) Certification

With respect to the issue determined by partial summary judgment in favor of defendant on Count II of the complaint pursuant to an opinion, filed February 8, 1979, and order, entered March 14, 1979, it is CERTIFIED, in accordance with Rule 54(b), *Fed. R. Civ. P.*:

(1) That the Court has directed the entry of final judgment in favor of the defendant on the relevant portions of Count II of the complaint; and

(2) That the Court has determined that there is no just reason for delay.

/s/ CLARKSON S. FISHER
Chief Judge
United States District Court
District of New Jersey

Dated and Filed: April 30th, 1979.

Appendix E

STATUTES AND REGULATIONS INVOLVED

1. SECTION 703(A) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §2000E-2(A) (1976):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. SECTION 703(H) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §2000E-2(H) (1976):

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it

be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

3. EQUAL PAY ACT OF 1963, 29 U.S.C. §206(D)(1) (1976):

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Appendix E.

4. EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. §1604.7 (1965), ORIGINALLY PUBLISHED IN 30 FED. REG. 14928 (DEC. 2, 1965):

Relationship of Title VII to the Equal Pay Act

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

Appendix E.

5. EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. §1604.8 (1979), ORIGINALLY PUBLISHED IN 37 FED. REG. 6836 (APRIL 5, 1972):

Relationship of Title VII to the Equal Pay Act

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised, the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

Appendix F

UNITED STATES GOVERNMENT
Equal Employment Opportunity Commission
MEMORANDUM

DATE: Jun. 6, 1967
In reply refer to:

TO:

Tom E. Robles
Director, Albuquerque RO

FROM:

Kenneth F. Holbert
Acting General Counsel

SUBJECT:

Applicability of Section 800.108 of Administrators Interpretative Bulletin on Equal Pay for Equal Work, Part 800 to Proceedings under Title VII of the Civil Rights Act of 1964 in Light of the Commission Guidelines on Sex Discrimination, Part 1604 Commission Procedural Regulations, Section 1604.7

The following question has been raised before your office: A privately-owned public utility operating within your region has multiple offices. A charge of discrimination has been filed by a female employee operating in one office building in a large city. The basis of the charge is that she is paid less for performing similar work to that performed by male employees because of her sex. The male employees with whom she is being compared are employed in a separate building which is located approximately two miles away from the site of the employment of the Charging Party. Under the above-cited Interpre-

tative Bulletin of the Administrator, Wage and Hour Division, as explained in the Administrative Opinion of the Administrator of June 17, 1966, (BNA, FEP 401:-739), and as applied by the Administrator in similar situations, the male employees are located in a separate establishment from the female employee within the meaning of the Equal Pay provision of the Fair Labor Standards Act. Therefore, no comparison of the wages of said male and female employees may be made for the purposes of determining a violation of the Equal Pay provisions of the FLSA.

You raise the question whether the concept of "establishment" and related administrative interpretations and opinions under the Equal Pay provisions of the FLSA constitute "relevant interpretations" within the meaning of Section 1604.7 of the Procedural Regulations of the Commission, so that the Commission is bound by said opinions and interpretations.

It is concluded that Section 800.108 of the Interpretative Bulletin of the Administrator and opinions issued thereunder do not constitute "relevant interpretations" within the meaning of the Commission Procedural Regulations cited above, and that in processing cases alleging discrimination in pay based on sex, the Commission is not restricted to a comparison of rates in the same "establishment" of a multi-establishment employer.

The "relevant interpretations" of the Equal Pay Act to which the Commission regulations speak are those dealing with the measurement process in determining whether there is equal pay for equal work, within the area in which the FLSA and the provisions of Title VII overlap. This means that in situations to which [both] statutes are applicable, the same standards and rules

shall be applied to determine whether there is "equal pay for equal work". However, as Section 1604.7 of our Procedural Regulations suggests, the regulation was not intended to restrict the coverage of Title VII to those situations where the FLSA is not applicable. The Equal Pay provisions of the FLSA are applicable only within the limits of an establishment as that term is used in the statute, and as it has been interpreted. The concept of an "establishment" is foreign to Title VII. Title VII contains no such limitation unless it is found in Section 703(h) which provides:

> It shall not be unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the FLSA of 1938 as amended.

Differentiations which are authorized under said Section are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.

It is the interpretation of these provisions that requires harmonization between Title VII and the Equal Pay amendment to the FLSA, because these are the provisions which, within the meaning of Section 706(h), "authorize" differentiations. The Equal Pay amendment [703(h)] does not authorize sex discrimination between employees in different establishments, within the meaning of Section 703(h).

It simply does not deal with such discrimination. No affirmative Congressional intent to authorize discrimination on the basis of sex between employees in different establishments may be read into Section 703(h), or into Section 1604.7 of the Procedural Regulations of the Commission. Accordingly, the concept of "establishment" and its interpretations and limitations are not applicable to proceedings under Title VII.

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